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IN THE SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1893.

CASE No. 15281. TERM No. 966.

THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, *Plaintiff in Error*,

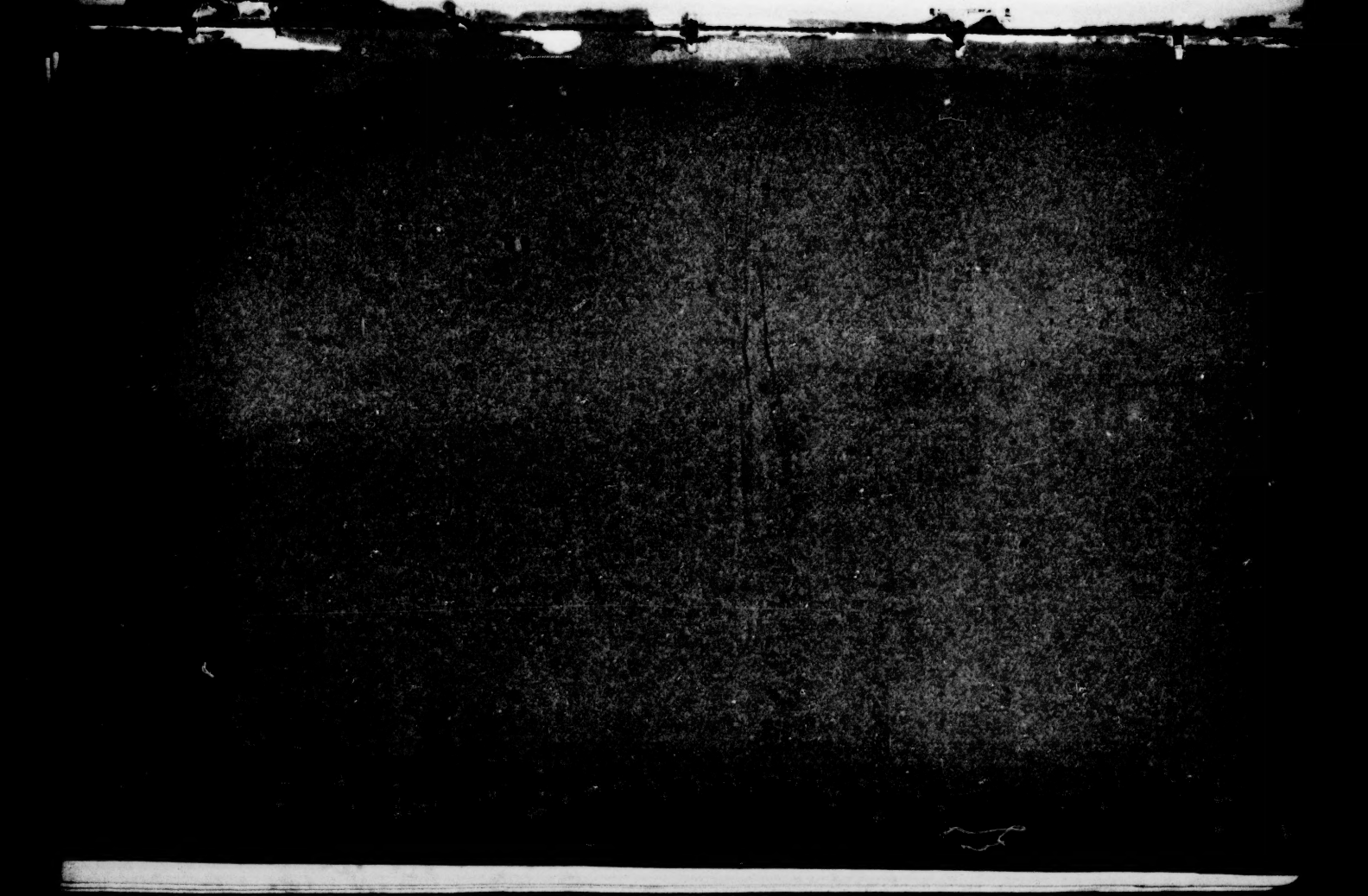
vs.

VICTOR M. BACKUS, AS TREASURER OF MARION COUNTY, INDIANA, *Defendant in Error*.

ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

BRIEF FOR DEFENDANT IN ERROR.

WM. B. BURFORD, PRINTER, WASHINGTON, D.C.



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THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, *Plaintiff in Error*,

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IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

BRIEF FOR DEFENDANT IN ERROR.

THE CASE.

May 2, 1892, plaintiff in error filed its complaint in the Circuit Court of Marion County against the defendant in error, asking that the defendant should be enjoined from collecting certain taxes. The complaint was afterward amended, and appears in the record from pages 3 to 26, inclusive. May 28 an answer in general denial—the general issue—was filed. (Record, page 27.)

The case was heard before the Court, without the intervention of a jury, from the 27th of June to the 5th of July inclusive (pages 28–9), and taken under advisement by the Court until the 19th of September, when there was a finding for the defendant and judgment accordingly. On the same day motion for a new trial was filed (pages 29 to 39, inclusive), which was overruled, and an appeal taken to the Supreme Court of the State (page 39).

A bill of exceptions, containing the evidence, with the rulings of the Court upon the trial, was filed October 18, and is contained from pages 39 to 406 of the record. October 28th the plaintiff in error filed its transcript and assignment of errors in the Supreme Court of the State (page 416). The defendant in error appeared and filed his joinder in error on the next day, the 28th day of October. (Pages 420 and 421.)

The briefs in the Supreme Court in the State of Indiana are not copied into or referred to in the record, but the points and authorities for oral argument on behalf of the plaintiff in error are found at pages 422 to 429, inclusive, and the points and authorities for oral argument on behalf of the defendant in error are found at pages 430 to 439, inclusive.

February 3, 1893, the judgment was affirmed, the opinion pronounced in the case being found at pages 439 to 459, inclusive. February 22, 1893, plaintiff in error filed its assignment of errors (pages 460 to 464, inclusive), and a petition for a writ of error and citation (pages 465 to 467, inclusive). The writ of error is at page 469.

THE COMPLAINT.

The complaint is quite elaborate, and is exceedingly profuse in charge and accusation against the act of 1891, and also against the acts of the State Board of Tax Commissioners in proceeding under it, its liberality in this respect being practically limitless.

The jurisdiction in this case arises under section 709 of the Revised Statutes of the United States, and this Court exercises appellate jurisdiction over the decision by the Supreme Court of the State of Indiana, because of the fact that there is "drawn in question the validity of a statute or an authority exercised under any State on the ground of their being repugnant to the

Constitution, treaties or laws of the United States, and the decision is in favor of their validity."

No jurisdiction is conferred upon this Court to re-examine and reverse the decision of the State Court except solely upon the federal questions presented by the record. In analyzing the complaint and record, therefore, it is not material or necessary to point out the numerous infractions of the State Constitution, or the many errors alleged in the record to have been committed by the Court below upon the trial upon questions of general practice, or upon questions affecting the State Constitution, for there is no warrant of law for this Court to relieve from such alleged errors if any such errors were committed. As to them, the decision of the State Court is final and conclusive. It is only when rights guaranteed by the Constitution of the United States are invaded or denied that this Court will attempt to exercise the appellate jurisdiction provided by section 709, and its consideration is limited precisely to those questions. It would be, therefore, entirely a work of supererogation to mention, either in detail or in general, the grave accusations made by the complaint in these latter respects. It is sufficient, with reference to them, to say that, with the exception of the questions attempted to be presented with respect to interstate commerce, the Constitution of the State of Indiana contains substantially, in apt language, if not in identically the same words, the provisions against depriving a party of his property without due process of law, and against the denial of the equal protection of the laws, as are contained in the Constitution of the United States with its various amendments, and the Courts of the State in this case, speaking with absolute and unquestioned authority, so far as concerns the State Constitution, have held upon the record that no such infractions of the State Constitution as alleged were made by the act of March 6, 1891, nor by the State Board of Tax Commissioners while proceeding pursuant to the requirements of the act. While we concede that the decisions of the State Courts upon questions arising under its own Constitution, even although the language of the State Constitution was *totidem verbis* with the United States Constitution, are not conclusive upon this Court, where it is properly alleged by the record that the acts complained of were in violation of the Constitution of the United States, it is perhaps not out of place to

call the attention of the Court to the fact that the Supreme Court of the State, having before it and being required to pass upon, the validity of the act in question, and of the proceedings of the State Board of Tax Commissioners, alleged to be in violation of the Constitution of the State in the same respect and to the same extent that they are alleged, with the exception of the interstate commerce matter, to be in violation of the Constitution of the United States, has held that neither the act nor the proceedings of the State Board of Tax Commissioners were open to that objection.

With this allusion to the questions of local law and State Constitution, we beg to call the attention of the Court to the respects in which the Constitution of the United States is by the record alleged to have been violated by the act in question, or by the proceedings of the State Board of Tax Commissioners. Briefly summarized, they are as follows:

I.

That the act of March 6, 1891, is unconstitutional in the respect that it—

a. Deprives the plaintiff in error of its property without due process of law, in that the act fails to provide:

1. For a notice to the railroad companies affected by the act of the meeting of the State Board of Tax Commissioners for the purpose of assessing their property for taxation.
2. For a hearing of railroad companies by said Board in connection with such assessment.
3. For a rehearing after their assessment has been determined upon by the State Board.

b. Denies to the plaintiff in error the equal protection of the laws in that—

1. Individuals are required to be assessed in their respective localities by township assessors, and local corporations by County Boards of Review, while the owners of railroad property, as to their unit property, have no local assessment, but are required to submit to an assessment in the first instance by the State Board of Tax Commissioners.

2. Individuals are given the right to apply for relief from their original assessment to the County Board of Review, and thence to the State Board of Tax Commissioners, and local corporations are accorded the right of appeal from the County Boards of Review to the State Board of Tax Commissioners, while the owners of railroad property, as to their unit property, are given no right of appeal or revision, but the original assessment of such property is final and conclusive.
3. The owners of property other than railroad property are afforded a tribunal to which they may apply for relief from their assessments, in which the property owner may produce evidence which the tribunal must weigh with the right to confront, cross-examine and rebut the evidence adduced against them, whereas no such tribunal is afforded to owners of railroad property.

In these respects thus violating the provisions of the last two clauses of the first section of the Fourteenth Amendment to the Constitution of the United States.

II.

That the act of March 6, 1891, is in violation of section 8, article I, of the Constitution of the United States in that it required and permitted the State Board of Tax Commissioners to assess a tax upon interstate commerce.

III.

That the State Board of Tax Commissioners in proceeding under the act of March 6, 1891, did in fact, whether required so to do by the act or not, assess a tax upon interstate commerce, and thus the State, acting by its agents, had, in violation of section 8 of article I, of the Constitution of the United States, assessed a tax upon interstate commerce, not withstanding the act of March 6, 1891, might not be held to have required or authorized it.

IV.

That the action of the State Board of Tax Commissioners in proceeding under the act of March 6, 1891, resulted in depriving the plaintiff in error of its property without due process of law and in denying them the equal protection of the laws, because the Board administered the act "with an evil eye and an unequal hand" within the meaning of the case of *Yick Wo* v. *Hopkins*, referred to *post*; and thus the constitutionality of the act in its exercise by the State Board of Tax Commissioners was called in question without reference to the actual provisions of the act itself.

To the complaint as finally amended, no demurrer was interposed, but the general issue was taken, and all the questions sought to be presented by the record came up on the hearing and are only presented in the record by the rulings upon the evidence admitted and excluded, and by the order and judgment of the court entered upon the evidence. Otherwise than this, no questions whatever are presented by the record. The record shows that the State Board of Tax Commissioners acted with reference to the assessment of taxes for the year 1891, and that duplicates were in the hands of the proper officers for the collection of taxes levied, and that the foundation of the authority for levying, assessing and collecting the taxes with respect to railroad companies is in the act of March 6, 1891, so that the question of the validity of that act in the respect in which it is attacked was necessarily before the State Courts, and it is properly before this Court inasmuch as in the absence of the act of March 6, 1891, there would be no such thing in the State of Indiana as a State Board of Tax Commissioners, and there would be no warrant for its action.

The trial in the State Court at *nisi prius* resulted in a finding and judgment in favor of the defendant in error. The errors assigned in the Supreme Court of the State (page 416) are

"1. The Court below erred in rendering a judgment and decree against appellant plaintiff below, and in favor of appellee defendant below.

"2. The Court below erred in overruling appellant's motion for a new trial."

Under the practice in the State of Indiana, the latter reason alone presents a question for the consideration of the State Supreme Court, and that Court in its opinion pronounced on the 3d day of February and found at pages 439 to 459, inclusive, of the record, held that the Court below had committed no error and affirmed the judgment; thus holding that the Court below had not erred in overruling the motion of plaintiff in error for a new trial. By the assignment of errors (pages 460 to 464, inclusive) the plaintiff in error has assigned sixteen reasons why the judgment of the Supreme Court of the State of Indiana should be reversed, but each and every of the reasons assigned why that judgment should be reversed, so far as it presents any federal questions, is contained in the propositions stated in this brief, *supra*.

Section 709 of the Revised Statutes of the United States, *supra*, provides that it is the final judgment or decree only of the Court of the State which may be re-examined and reversed. No authority is conferred upon this Court to re-examine or reverse any interlocutory order or decree of any Court of the State whether high or low.

The statutes of the State of Indiana provide, section 662, that when a cause is decided, whether by affirmance or reversal, either party may, within sixty days, file a petition for a rehearing. It will be observed from the record in this case, that, while the opinion was pronounced on the 3d day of February, 1893, the assignment of errors was filed on the 22d day of February (page 459), and the petition to grant an injunction filed at the same time, and the writ of error (pages 468, 469) granted on the 27th day of February, 1893. All this within less than four weeks from the time the original opinion was pronounced. That no petition for a rehearing was filed, and the writ of error granted before the sixty days had elapsed within which a petition for a rehearing might have been filed, and until which time the opinion and judgment for affirmance did not become final and absolute, so that this Court must know from the record filed that, at the time of allowing the writ of error and issuing the citation, the judgment of affirmance had not become final and conclusive, and can not know from the record whether it did or did not in fact become final and conclusive by the overruling of a petition for a rehearing, in case one had been filed, or by the failure to file such petition within

the sixty days allowed, and the consequent finality of such judgment and decree by the lapse of sixty days without the filing of such petition for a rehearing.

THE ASSIGNMENT OF ERRORS BY PLAINTIFF IN ERROR.

Under the practice in Indiana, the assignment in the Supreme Court that the Court below erred in overruling the motion for a new trial, brings into the record everything that transpired upon the trial which was made the foundation of the motion for a new trial, and, therefore, in the Supreme Court of the State all questions presented by the motion for a new trial were properly before the Supreme Court of Indiana for its consideration, except as they were waived by not being mentioned and discussed in the brief.

The assignment of errors filed in this case (pages 460 to 464) presents sufficiently, we think, the question of the constitutionality of the act of March 6, 1891, so far, and so far only, as the act can be said to be objectionable in that respect from its own terms and provisions. So far as any questions are sought to be brought into the record in connection with the action of the State Board of Tax Commissioners while proceeding under the law, we submit that the assignment of errors is not sufficiently definite and specific to present such questions.

The jurisdiction of this Court, under section 709, is confined to federal questions. If this Court, by writ of error to a State Supreme Court, had jurisdiction to consider, affirm or reverse every question of law, federal or otherwise, presented by the record, we take it that an assignment of errors that the State Supreme Court erred in affirming the judgment of the Court below would be sufficient; but where the jurisdiction is limited and restricted, the assignment of errors ought to be specific, definite, directed to the federal points presented, and, if it is claimed that those points arose upon the admission or rejection of evidence, that the assignment should refer with reasonable certainty to such evidence the admission or rejection of which was claimed to be error.

Section 997 of the Revised Statutes of the United States provides that an assignment of errors shall be returned with the writ of error.

Specification 1, of Rule 8, of this Court provides that the Clerk of the Court shall transmit with a copy of the record a copy of the assignment of errors. How definite that assignment of errors is required to be, the rule does not state, but in Specification 2, of Rule 21, of the rules of this Court, with reference to briefs, it is provided that when the error alleged is to the admission, or the rejection of evidence, the specifications shall quote the full substance of the evidence admitted or rejected. Certainly there should be some reasonable particularity in the assignment of errors as to the evidence, the rulings upon which are complained of as error, and if that be true, there is naught presented by the twelfth, thirteenth, fourteenth and fifteenth assignments of error. To hold otherwise would be to require the defendant in error, when called upon, to defend the record against the charge of error committed, to shell the woods, and discuss every possible phase of the evidence in every conceivable bearing, lest, perchance, something might escape his observation. We respectfully insist that no such rule ought to be required of one defending the correctness of a record, but that the presumption should obtain throughout the proceedings, that the Court below committed no error, unless with reasonable certainty and definiteness, the particular respect in which it is to be attacked is pointed out.

The plaintiff in error, while attacking the record below, contented itself with general charges so far as the rulings of the Court were concerned, and in that respect its brief, so far as we have seen it at the present writing, is prepared upon the same plan, viz.: to allege in a complaint and then iterate and reiterate in a brief in the hope that some of the suggestions so constantly reiterated will find a lodgment somewhere. It certainly must be taken as true, that where a party alleges that wrong has been committed by which he has suffered, especially where that wrong is alleged to consist of fraudulent, arbitrary and oppressive acts, the party should be held to some measure of proof, and yet, it seems to be assumed by the plaintiff in error in this case that as applied to railroad companies, no such rule will obtain anywhere. Indeed the record shows (at the foot of page 27 and the top of page 28) that upon the defendants in error filing the general issue, which the world over

puts the burden of proof upon the party making the allegation, the plaintiff in error immediately moved the Court for judgment in its favor upon the pleadings filed; that is to say: grave, not to say wanton, charges of fraud, dishonesty, amounting to gross official corruption against the administrative officers of the State and the State Taxing Board were made; and when those charges were formally denied in a manner requiring the plaintiff in error to prove them, plaintiff in error immediately interposes a motion for judgment in its favor upon that condition of the issue, and that course was followed, not only in the State Supreme Court, but even in this high tribunal.

The whole of the brief of plaintiff in error is devoted not to what was heard upon the trial; not to what was testified to by the witnesses; not even to what evidence the Court received and rejected, but to the allegations of its complaint. With but one exception, viz.: that part in which is discussed the evidence in regard to the statement of Van Vorhis, there is no effort, either in assignment of error or in brief, to point out anything in anywise referring to what took place on the trial. Doubtless this Court would have the right, we suppose, to take the bill of exceptions containing the evidence, commencing on page 40 and ending with page 406, and read all the evidence that was offered, admitted and rejected, and from that come to a conclusion as to the fairness of the trial, as to what had been proved and as to whether evidence that was admitted on behalf of the defendant in error ought to have been admitted, or as to whether evidence of the plaintiff in error that had been rejected ought not to have been admitted. We submit that no such burden can be placed, either upon the Court who is to pass upon the question, or upon adverse counsel; but that where no attack is made upon the trial except in general terms and by railing accusations, no duty can be cast upon the Court to wade through the evidence and the rulings of the Court as shown by the bill of exceptions to see whether those accusations are true. The facts proved upon the trial were very limited in their scope, and can be briefly set forth, and in order to show how utterly without foundation are the accusations contained in the brief of plaintiff in error, we beg to call the attention of the Court to the evidence upon which the Court below made its finding in favor of the defendant.

An analysis of that evidence is as follows:

ORAL EVIDENCE.

JACOB P. DUNN.

Have made some study of the science of taxation. (Page 40.) Am the author of two pamphlets on the subject of taxation, parts of which were first printed in the Indianapolis Sentinel and then afterwards printed in the pamphlets.

Never was before the State Board of Taxation. Had some talk with some of the members, Mr. Matthews, Mr. Henderson and Mr. Walker, during the time while the Board was in session. Prepared some figures for Mr. Matthews (page 41) and submitted them to him, but to no other members of the Board. Mr. Matthews took the figures from me and they were not returned until to-day. Talked, in addition to Mr. Matthews, with Mr. Henderson and Mr. Walker either about the figures or the method of taxing the railroad company. Do not know whether those figures were considered by or presented to Mr. Henderson or Mr. Walker. (Page 42.)

CLAUDE MATTHEWS.

Am a member of the State Board of Tax Commissioners. A paper was handed to me by Mr. Jacob P. Dunn during the consideration of the property of the C., C., C. & St. L. in August, 1891. Do not remember whether it was before or after the C., C., C. & St. L. had been heard. (Page 43.)

This paper was not before the Board, nor any memorandum based upon it. I presented a paper to the Board. That paper was the assessment; not the basis of the assessment, but the assessment itself. (Page 44.)

In connection with others, I presented some papers to the Board, but not containing any figures showing the amount of bonds or stocks or cost of construction or indebtedness. (Page 45.)

Presented no paper containing the amount of the bonds or indebtedness of the C., C., C. & St. L. nor of its stocks, nor of its cost of construction. (Page 46.)

Do not know where the papers that I presented to the Board are; I have not seen them since the adjournment of the Board. (Page 47.)

The papers which I presented to the Board were partly in my handwriting, partly in Mr. Henderson's and partly in Col. Walker's, but I am not certain. Do not remember how long before the 8th of September this was. They were presented during the time we were considering the assessment of the C., C., C. & St. L. I do not know where they now are. (Page 48.)

There was evidence before the Board other than that contained in the returns of the C., C., C. & St. L. I believe no witness was examined under oath, or otherwise, by the Board as to the character, condition or value of the railroad track of any of the lines of the C., C., C. & St. L. (Page 51.)

It was admitted that about the 27th of June, 1889, the C., C., C. & St. L., owning a line of railway from Cleveland, Ohio, to Cincinnati, Ohio, with a branch from Galion, Ohio, to Indianapolis, Indiana, was consolidated with the C., I., St. L. & C. Ry. Co., a company owning a line of road from Cincinnati, Ohio, to Lafayette, Indiana, and with the I. & St. L. Ry. Co., a company owning a line of road from Indianapolis, Indiana, to Terre Haute, Indiana, forming a new consolidation called the C., C., C. & St. L. Ry. Co., this consolidation existing in Ohio and Indiana pursuant to the statutes of those States. (Page 59.)

CHARLES M. MEYERS.

Paid the taxes in 1891 to the Treasurer of Marion County for the C., C., C. & St. L., except the C., W. & M.; in all $13,453.59. The payment was accepted as belonging on the whole duplicates, the taxes chargeable on the duplicates to the C., C., C. & St. L., taken on account, and embraced no sums paid on account of the Peoria & Eastern between here and Illinois line, and the old O., I. & W. between Indianapolis and the Ohio line. It embraced nothing except railroad track and rolling stock. The other property was paid in full. On the other property my recollection is I paid $2,500 or $3,000. (Page 72.)

The map in evidence shows substantially correctly the Big Four system in its general direction. The payment was received by the County Treasurer on account of taxes, although it covered the first half of the taxes charged in this county. I

simply tendered money and asked for a receipt and got it. I knew that the amount paid was not the full amount charged. (Page 73.)

The lines on the map represent the Big Four system. How these lines are held, owned or operated, I can not testify. The Chesapeake & Ohio is shown because Big Four trains arrive at Cincinnati and make close connection with the passenger trains on the Chesapeake & Ohio. (Page 74.)

Do not know whether there is any running arrangement between the Big Four and the Chesapeake & Ohio. (Page 75.)

I. N. WALKER.

Am a member of the State Board of Tax Commissioners, and was in '91. During the forty days of the session the time of the Board while they were in session was fully occupied. (Page 79.)

FRANK TAYLOR.

Have lived in Indianapolis eleven years. Am loan agent of the Northwestern Mutual Life Insurance Company. Have familiarized myself with the values of real estate in various counties throughout Indiana for the purpose of examining securities offered. The company has handled large and small amounts, and its business would equal that of any company in the State. (Page 79.)

Familiarized myself with values of real estate in various counties, more especially in April, '91, in the central and southern parts of the State. (Page 80.)

In Benton County real estate was worth $45 an acre; Carroll, $40; Bartholomew, from $40 up; Blackford, close to $40; Boone, $40 and up; Clinton, $45 or over; Delaware, $45 to $50; Elkhart, $40; Fountain, $45; Grant, $45 to $50; Hancock, $45 and up; Hendricks, $40; Henry, $45 to $50; Howard, $50; Huntington, $35; Jasper, between $15 and $20; nearer $20 than $15; Johnson, $45; Madison, $50; Miami, $40; Montgomery, $40 to $45; Randolph, about $40; Rush, $45; Shelby, $45; Tippecanoe, $40; Tipton, $45; Wabash, $45; Wayne, $40.

CROSS-EXAMINED.

Bartholomew is from $40 to $45; Boone from $40 to $45; Montgomery from $40 to $45; Grant close to $50 or $45; Howard, $50; Blackford, $40 to $45; when I say close to, I mean I don't know what the figures show; that it varies somewhat; Delaware from $45 to $50. (Page 83.)

In natural gas counties the sales have been somewhat higher on that account. I look at the lands in connection with loans that were to be made, and handling real estate after mortgages had been foreclosed. I passed on the valuations for the purpose of making loans. We have never taken property in the foreclosure where the parties lived. In four cases within ten years foreclosures have been made.

Jasper County between $15 and $20; nearer $15 than $20.

There is some very good land there and some very wet land that will sell for $50.

During ten years I have had no other business than looking after loans of the company. (Page 84.)

I take principally into consideration actual sales. Can not state how many sales I have known of in Randolph County since April 1, 1891. I know of sales, but can't tell what they were. Got my information from an examination of the records as to the consideration, and then talking to the parties who sold or bought, if possible. Presume I found twenty or thirty records, and saw the parties in five or six cases. (Page 85.)

Saw three or four instances in the north and three or four instances in the west part of Randolph County. In Jasper County know of sales of over 27,000 acres since April, 1891; run from $7 to $5 an acre in wet land. Since the 1st of April have been doing special work examining securities for parties who wanted to make loans as individuals. I have made sales for some parties and acted as purchaser for others. Have not been in the employ of any railroad company for any purpose, and made no investigation until I was subpœnaed in this case, which was last Saturday. Before that time did not talk to anybody, or have notice or information to be prepared to be examined. Sometime during June I was informed that I might be a witness. (Page 86.)

In Bartholomew County examined records and saw quite a number, but did not see the parties. Saw twenty or thirty in the abstracter's office in March. Went down there, as I had application for loans for the Northwestern. Some of the property in the northwest part of the county is not worth much; some very poor. (Page 87.)

Was up in Elkhart in '91; investigated twenty or thirty; talked with people about them to ascertain their ideas of value for the purpose of getting at the value of the securities that I was examining. (Page 88.)

Talked with other parties about the values of real estate; parties who had property for sale and parties who were prospective purchasers. Did not find a wide difference of opinion. Found a difference, but not a wide difference; rarely varying over $5 an acre. (Page 89.)

Is not true that as a rule it is the best lands that are being transferred in Jasper County. It is the very poorest. Lands in Bartholomew County in the west edge of the county were selling for less than $20 an acre. (Page 90.)

Howard County worth $50 an acre. I have heard of sales there on cash and time. I don't know whether there were any sales on time, or all for cash. Can't say that in any county I knew of sales where the consideration was entirely cash. (Page 91.)

JOHN O. HENDERSON.

The returns of the Big Four were made out upon forms prescribed by the Auditor of State. They were prepared under the direction of the State Board of Tax Commissioners. (Page 156.)

It was here admitted that the returns offered in evidence were, by the Auditor of State, laid before the State Board of Tax Commissioners, as the statute requires, and it was conceded that the assessment by the State Board of Tax Commissioners was returned to the Auditor of State, and by him to the County Auditor, and the taxes were extended upon the duplicate and are in the hands of the County Treasurer, and that the company is the owner of the right of way specified in the county. (Page 157.)

F. J. VAN VORHIS.

Appeared before the State Board of Tax Commissioners on the 18th of August, '91, about half past seven in the evening. (Page 157.)

Governor Hovey was there and all the other members of the Board, and the Attorney-General. I was at the time acting under the employment of the Board of Commissioners of Marion County. And I appeared before and spoke to the Board. I was not sworn. I can not say that there was any representative of the C., C., C. & St. L. present, although I had an impression that Mr. Cox was there. (Page 158.)

I was not cross-examined by anybody. I was not a witness. (Page 159.)

CROSS-EXAMINED.

I am an attorney-at-law, and was before the Board representing the Board of Commissioners of Marion County, as their attorney. The paper that I identified was printed after the 27th of August and before the 1st of September. I know Mr. John T. Dye. I was present before the State Board of Tax Commissioners when he was there as an attorney for the C., C., C. & St. L. I sent Mr. Dye a copy of my brief through the mail, addressed to him at his office, with a stamp on it. (Page 163.)

Within two or three days after the 18th of August Mr. Dye spoke to me in reference to my appearing before the Board, and we had a conversation about it. (Page 164.)

RE-EXAMINED.

I sent you, Mr. Dye, the first edition of my brief. You afterward sent to my office saying that you had mislaid the other, and I sent you a second copy. The whole communication was in type on the morning of August 27, and I got four or five hundred of them August 28. (Page 165.)

They were all sent out either Saturday, August 29, or Monday, August 31. I sent them to all the railroad attorneys about the same time. (Page 166.)

I think there were a dozen people present, in addition to the Board, when I appeared before it. The doors were all open.

JOSEPH T. FANNING.

Deputy Auditor of the State and Secretary of the State Board of Tax Commissioners. (Page 184.)

I had printed forms for the purpose of notifying the railroad companies and corporations that they would be heard on a certain date, in which I inserted the date. (Page 185.)

I am satisfied that the 21st of August is the date which I inserted in the notice to the C., C., C. & St. L. I have no recollection of serving any other notice on the C., C., C. & St. L. I was present at the meeting of the Board on the night of August 18, when Van Vorhis was there. They adjourned at 10 or 11 o'clock at night on that particular date. (Page 186.)

I think that Governor Hovey was not present at the night session, but was at the afternoon. I suppose the day session closed between 5 and 6 o'clock; it then took a recess for supper. When they arose in the evening it was stated that they would meet again after supper, and Governor Hovey asked to be excused from attendance that evening. That meeting on the night of the 18th of August was by the Board in its official capacity, and the adjournment on the 18th was made after Mr. Van Vorhis had been heard at the night session. (Page 187.)

There were some adjournments during the forty days of its session. I do not know how many there were, but the record will show that correctly, and also the number of days which were consumed in hearing the various railroad companies and the statements of their counsel. The assessments of the railroads were made September 8. We commenced recording the assessments immediately on the 8th of September, and completed it on the 11th, the day of the adjournment. I made figures under the direction of the Board, setting down sums against the various railroad companies, after the statements had been made. I could not do it all myself and I had several assistants. Some of the figures upon which the assessments were based are in my possession. The figures that were given to me as Secretary of the Board, I brought here and gave to Mr. Henderson. Those were the only ones I had. (Page 188.)

I did mathematical work for the Board in distributing values, but not before values were fixed by the Board. After the valuations had been fixed, I made the tables shown in the report. (Page 189.)

So far as the stenographer was concerned, his work closed at four o'clock on the afternoon of Wednesday August 18, and it was told him that it would not be necessary for him to attend the night session. (Page 190.)

Many parties appeared before the Board and made oral statements, of which the Board did not require me to keep a record. I do not know how many appeared on the 18th of August. None of the clerks that I have named did any mathematical work before the final making up of the record of the assessment for the Board. (Page 191.)

CROSS-EXAMINED.

Have no recollection as to the form of the notices sent out to the C., C., C. & St. L. I know there was a notice sent out.

D. H. WILES.

Am acquainted with the values of real estate in Wayne, Henry and Rush Counties. Have been in the mortgage and loan business for the last ten years, and suppose I have loaned money in those counties. Part of my duty was to inform myself of the value of real estate in those counties. Have made loans upon real estate in those counties and investigated into the values. Land in Henry County is excellent. (Page 193.) Worth $50 an acre. In Rush $50. In Wayne $45 to $50.

CROSS-EXAMINED.

The loan I made in Henry County was made probably three years ago. The last loan I made in Rush County was made probably two years ago. The last loan I made in Wayne County (farm loan) was two years ago. (Page 194.)

I went to look at the land in Wayne and also in Rush County. I never made a loan without going to look at the land. I didn't go to look at lands in Henry and Rush counties with reference to my testimony here. (Page 195.)

Can't give the last loan made in Wayne or Rush counties. The last made in Henry County was to a man by the name of Moore; about 150 or 160 acres. That land was worth $100 an acre, and I loaned $4.000 on it. (Page 196.)

Don't think I made five loans in the last five years in Wayne County. Don't know that I made one in Henry County; probably five in Rush County, but can't say. In every instance when I made a loan I examined the particular property. (Page 197.) In giving the estimate of the values of the real estate that I have given here I take into consideration the improvements.

MATTHEWS RECALLED.

In assessing and fixing the value of the St. Louis & Chicago Division, and of the leased and operated lines of the C., C., C. & St. L. we did not place or add anything to the value by reason of the fact that they had a franchise. (Page 218.) And in assessing we added nothing to the value on account of good will or bad will. (Page 214.)

CROSS-EXAMINED.

Mr. Dye was there before the Board, and during its session, and before it had arrived at the valuation, on behalf of the C., C., C. & St. L. and representing them, and made statements to us in regard to the value of the railroad track and rolling stock of the C., C., C. & St. L. At that time the Board was in session.

RE-EXAMINED.

I presume it was the 21st of August when Mr. Dye was there.

RE-CROSS-EXAMINATION.

I think there were others there beside Mr. Dye, but I can not positively state. (Page 216.) My impression is that these others were there after the 21st of August, but am not positive. There was no one before the Board representing the C., C., C. & St. L. after the 8th of September, and no notice was given.

DOCUMENTARY EVIDENCE.

1. Map of the C., C., C. & St. L. (Between pages 72 and 73.)
2. Returns of C., C., C. & St. L. and leased lines. (Pages 106 to 126 and pages 128 to 154.)

3. The assessment of the C., C., C. & St. L. (Page 127.)
4. Extracts from the report of the State Board of Tax Commissioners. (Pages 167 to 172.)
5. Equalization of counties by the Board. (Page 180.)
6. Extracts from the explanatory statements by the Board in connection with tables. (Pages 183 and 184.)
7. Certificate of the Governor. (Pages 191 and 192)
8. Certificate of the Auditor of State. (Page 192.)
9. Voucher for payment of taxes. (Pages 200 and 201.)
10. Statement of taxes unpaid. (Page 208.)

From this evidence we submit that the trial Court could have made no other finding than the finding it did, unless the law itself is open to the objections of unconstitutionality made against it so persistently by the plaintiff in error, and that the charges made with such bitterness and recrimination against the Board of administering the law with an "evil eye and unequal hand," of withholding assessments until too late for them to be investigated, are not worthy of respectful consideration. With these allusions to what occurred upon the trial as to the action by the Board, we come now to the discussion of the constitutionality of the act itself.

I.

THE GENERAL FEATURES OF THE ACT OF MARCH 6, 1891.

The act of 1891 with respect to the various charges against its constitutionality is substantially, if not identically, the same as the act of 1872, so that these various provisions of the law now objected to had been in force in this State uninterruptedly for nineteen years prior to the passage of the act in question. The act of 1872 was the first one enacted by the General Assembly in which there was any organized and definite effort made to provide for the revision or increase of assessments or to put property generally for the purpose of taxation upon any other basis than that returned by the tax-payers. Although the act of 1872 was in force, acted upon and acquiesced in by all of the citizens of the State and the various corporations existing here, and every department of the State Government for nearly twenty years, no question of its validity had ever been suggested in any form until this and other cases of a similar

character were filed by railroad companies because they were unwilling to pay the assessment made in 1891. Long continued acquiescence in a law is an important element in determining its validity.

State Board of Assessors v. *The Central R. R. Co.*, 48 N. J. Law 276.

Hovey, Gov., v. *The State, ex rel. Riley*, 119 Ind. 386.

Hovey, Gov., v. *The State, ex rel. Carson, Ib.* 395.

Substantially similar provisions of the law have been in force in a number of other States, and their constitutionality has been affirmed whenever questioned.

Gulf R. R. Co. v. *Morris*, 7 Kas. 210.

Francis v. *R. R. Co.*, 19 Kas. 303.

Dubuque v. *C. D. & M. Co.*, 47 Iowa 196.

Central R. R. Co. v. *Board*, 67 Iowa 199.

Carlisle v. *Pullman*, 8 Col. 320.

C., N. O. & T. P. R. R. Co. v. *Commonwealth*, 81 Ky. 492.

St. L., I. M. & S. Ry. v. *Worthen*, 52 Ark. 529.

Porter v. *The R. R. Co.*, 76 Ill. 561.

See also *L. & N. A. R. R. Co.* v. *The State, etc.*, 25 Ind. 180.

Home Insurance Co. v. *N. Y.*, 134 U. S. 594.

Bells Gap R. R. Co. v. *Penn., Ib.* 232.

II.

THE FOURTEENTH AMENDMENT.

Before calling the attention of the Court to the language of the text-books, and of the reported decisions which we insist absolutely sustain the validity of the act of 1891 in every respect in which it is questioned, we deem it proper to analyze, closely and carefully, the principal decisions relied upon by the appellants as sustaining their legal propositions. Examining them in the light of the circumstances under which the decisions were rendered, and, also, with the benefits to be derived from the subsequent opinions of higher courts with reference to these identical cases, or those involving similar propositions, we confidently submit that they do not sustain the position of plaintiff in error. The cases upon which plaintiff in error principally relies as establishing the propositions which must be established

or it must fail in its contention, are the *San Mateo*, the *Santa Clara*, the *Yick Wo*, the *Minnesota Railway Commission*, and the *Daussmann* cases. Without the support that the plaintiff in error claims to draw from the language used in these opinions, we confidently assert that the plaintiff in error would not have a leg to stand upon.

In considering the California cases, the historical fact of which the courts then and now will take judicial notice, must be borne in mind that for a number of years there was a decided controversy between the people, the authorities and the courts of California and the courts of the United States, Circuit and Supreme, over the railroads and the Chinese. California was determined that, treaty or no treaty, law or no law, "the Chinese must go," and that the railroads must be made to contribute in excess of their fair proportion of the public burdens. So universal was the latter feeling that, in the Constitution of 1879, it was a part of the organic law that in all other real estate, a mortgage should be construed as an interest in the land, and should be deducted from the assessment for taxation, while that was, in terms, denied to the railroad companies. We hardly think that the fact that Minnesota was one of the Granger States, entered into the consideration of the St. Paul case.

In the railroad tax cases, *County of San Mateo* v. *Southern Pacific Railway Company*, 13 Federal Reporter 722, decided September 25, 1882, Mr. Justice Field held:

1. That the Fourteenth Amendment to the Federal Constitution covered corporations as well as natural persons, and applied as well to taxation as to other methods of deprivation of property or discrimination.

2. The provision of the Constitution of California permitting other persons than railroad companies to deduct for taxation purposes from real estate existing mortgages, while railroads were required to be taxed for the full value of their property, without deduction on account of mortgages, was a discrimination in violation of the Fourteenth Amendment.

3. Neither the Constitution nor the statutes of California, in regard to the assessment of railroad companies, provide for any notice to the company of the time and place of assessing the property for taxation, nor do they afford to the company any right to be heard before the State Board of Equalization in the matter of assessing its property for taxation, and, in

that respect, the provisions of law of California deprive the company of its property without due process of law. Due process of law requires notice to the party to be assessed, with an opportunity to be heard upon the assessment, and as neither of these is provided either by the Constitution or any statute, the assessment complained of was, in that respect, in violation of the Fourteenth Amendment.

4. The act of 1881, being an amendment to sections 3664 and 3665 of the Political Code, was not properly and legally enacted, and can not, therefore, be considered in determining whether a sufficient opportunity was afforded railroad companies to be heard in regard to their assessments.

For the force and effect of the reasoning of Judge Field in this case and the scope of his decision, we must look to the Constitution and statutes of California, under and with reference to which the language was used. In *Stuart* v. *Palmer*, which is the leading case on the subject of the necessity of notice and the opportunity to be heard, being the case on which Mr. Justice Field mainly relies in the San Mateo case, Judge Earl, at page 188 of 74th N. Y., uses the following words:

> "It matters not upon the question of constitutionality of such a law that the assessment has, in fact, been fairly apportioned. The constitutional validity of law is to be tested, not by what has been done under it, but what may, by its authority, be done."

It appears from the opinion in the San Mateo case, at page 725, that the assessment in controversy was made by the State Board, May 2, 1881. This would be the last day upon which, under the law, the State Board could make its assessment. It does not appear, from the case, that whatever investigation was made by the State Board had not been fully completed at a time long anterior to the first Monday in May, but all that appears is that that was the day upon which the assessment was made, *i. e.*, closed up, recorded, announced or certified. We are relieved from any complication which might arise in an endeavor to properly analyze the opinions of Mr. Justice Field by the conclusion announced by him and Judge Sawyer, that the act of 1881 had not been constitutionally enacted, and therefore the case must be determined upon the law as it existed prior to the act of 1881. The obnoxious feature discriminating against railroad companies, with respect to mortgages, is contained in sections 1, 4, 9 and 10 of article XIII of

the Constitution of 1879. (See volume 3 of Hittell's Codes and Statutes of California, pages 34, 35 and 36, Supplement.)

Section 9, page 36, provides for the composition of the State Board of Equalization, and that its members shall be elected at the general election to take place in 1879, and their term of office shall be four years; and section 10 provides that it shall assess the railroad property. No provision is made in the Constitution of the time, place, or manner of meeting of the State Board, nor what, if any, notice shall be given in relation thereto, nor how any person interested may be heard.

Section 3664, amendment to the Political Code, page 177, provides—

a. That on or before the first Monday in May in each year, the State Board of Equalization shall assess certain property of railroads operated in more than one county.

b. That the officers of such companies shall furnish said Board, on or before the first Monday of April, a statement of certain facts in regard to the railroad company, somewhat similar to those required by the statute of Indiana.

Section 3692, page 179, provides:

a. That the State Board of Equalization shall "hold regular meetings at the State Capitol on the second Monday *in each month*, and such special meetings as the chairman may direct."

b. That they shall annually assess the franchise, etc., of railroads "at their actual value on the first Monday in March, at twelve o'clock, M., and to apportion such assessments," etc.

From these several sections it will be observed that the State Board was required to assess the value of the railroads as it existed on the noon of the first Monday of March, at some time between that hour and the second day of the succeeding May, at such time as it might feel disposed to make the assessment.

The Board was bound to convene on the second Monday in each month in regular session and whenever it was called together by the Chairman in special session, and there is nothing in the law to indicate that it might not perform, at its special sessions, any duty which it might perform at its regular sessions; so that it was entirely possible, under the law as it existed when Mr. Justice Field made his decision, for the Chairman of the State Board to call it together in special session on the afternoon of the first Monday in March for the purpose of assessing the Southern Pacific Railway Company, and that it should,

on that day and the days immediately following it, make its investigation and assessment of the railroad property without any manner of actual notice to the railroad and without any authority of law whatever to give the railroad any notice, and thirty days or more before, under the law, the railroad was required to furnish its statement, and at a time when it would probably be a physical impossibility for it, if it felt so disposed, to furnish the statements which, by law, it was required to furnish, and it does not appear, from anything stated in the decision, that this did not actually happen, so that, under the law, it was entirely possible for the State Board to have assessed the Southern Pacific Railway Company at a time when there was no notice, either public or private, to any person except the members of the Board, of any intention to hold a meeting and at a time when it was a physical impossibility for the company to have furnished the statements to be the basis or to be of assistance to the Board in fixing the valuation; and, as we have seen, the constitutionality of the law is to be measured not by what has been actually done under it, but what may be done, and inasmuch as, under the law of California which Mr. Justice Field had under consideration, it was entirely possible that the State Board could have concluded and determined the valuation which it would place upon the property of the company before the time within which the railroad company might file, or was required to file, its statement, and as the Board was authorized to do this at a private meeting of which no notice, either public or private, was to be given, it is not at all astonishing that the learned Judge arrived at the conclusion which he announced. The consideration of the case began with the fact staring them all in the face that the Constitution itself required a palpably unjust, oppressive and onerous discrimination against the rights of the company. Starting out with that proposition, it was easier for the Court to go to the foot of the hill and decide everything unconstitutional than midway to put on the brakes and, having decided the main fact, leave the other questions open.

From this judgment a writ of error was taken to the Supreme Court of the United States, but this writ was dismissed upon the showing that the matters in controversy had been adjusted and no opinion was expressed upon any of the questions decided in the Court below.

San Mateo County v. *Southern Pacific Railroad Company*, 116 U. S. 138; decided December 21, 1885.

In the *County of Santa Clara* v. *Southern Pacific Railroad Company and others*, Railroad Tax Cases, 18 Federal Reporter, 385, it was held by Mr. Justice Field:

First. The fact that the railroad company was chartered by the United States government and was used as a governmental appliance did not exempt it from local taxation.

Second. The provision of the Constitution of California permitting tax-payers to deduct from the value of their real estate the mortgages existing thereon, but denying this to railway corporations, was a violation of the Fourteenth Amendment to the Constitution. The opinion upon this provision, if possible, was fuller than in the *San Mateo* case, but on the same general line.

Third. Corporations, as well as natural persons, are protected by the inhibition against discrimination.

Fourth. Reference is made to the discussion of the necessity for notice in the San Mateo case, with the statement that nothing in the present discussion affected the accuracy of the former decision, but no special discussion is made, in this case, on this subject.

This case was decided September 13, 1883.

From this decision there was an appeal to the Supreme Court of the United States, where the judgment of the Court below was affirmed solely on the ground that the State Board of Equalization had confessedly assessed against the railway company fences along the right of way which, under the law, they were not authorized to assess, and inasmuch as it did not appear from the record what amount was included on this account the assessment was held void, the Court declining to consider the constitutional questions presented. In that case, Mr. Sanders, Mr. Wm. M. Evarts and Mr. George F. Edmunds represented the railroad company, and stated their objections to the assessment as follows:

First. That the railroads were a part of the means of the United States government for carrying on its operations, and therefore not taxable by the State.

Second. Discrimination against railroad companies on the mortgage question.

Third. That the amendments to sections 3664 and 3665 of the Political Code, made in 1881, were not constitutionally enacted.

Fourth. That no valid assessment appears to have been made by the State Board.

Fifth. That no interest could be recovered.

Sixth. The objection on account of the assessment of the fences.

No question appears to have been made by the learned counsel as to the constitutionality of the laws of California providing for the assessment because of the alleged fact that there was no due process of law in that no notice to the railway company was provided for by law and no opportunity to be heard. Whether the decisions of the Supreme Court in the Tax Cases in 92, 111 and 115 U. S., convinced their minds that it was useless to interpose such an objection, or whether they believed that the law, in that respect, was valid, notwithstanding Mr. Justice Field's decided expression of opinion on that score, or what may have influenced them in failing to present this objection we can not know, except that it is hardly conceivable, that, with the opinion of Mr. Justice Field in that very case below, staring them in the face, counsel with the standing of Mr. Evarts and Mr. Edmunds would overlook such a point.

In *Yick Wo* v. *Hopkins*, Sheriff, 118 U. S. 356, the City of San Francisco had passed an ordinance in regard to laundries, by the terms of which it was unlawful for any person to carry on a laundry unless the building in which it was carried on was made of brick or stone, without having first obtained the consent of the Board of Supervisors. It was shown that the petitioner, a Chinaman, and two hundred of his countrymen had petitioned the Board of Supervisors for permission to continue the business in the places where they had been carried on for more than twenty years, all of which petitions were denied by the Board of Supervisors, while they were eighty petitions by parties who were not Chinese, all of which were granted except one. It was clearly apparent that the Chinese were denied permission simply because they were Chinese and for no other reason. It could not be expected that, for the purpose of carrying on laundries, marble palaces should have been erected or maintained; all that could reasonably be required was that the business should be conducted in an orderly and

proper manner, so as not to interfere with the public comfort or public health. The Supreme Court holds that regard for the public health or the public comfort was not the controlling element upon which the Board of Supervisors denied the Chinaman the right to maintain a laundry, but that in fact the only reason why permission was refused him was that he was a Chinaman. At that time there was a treaty in force between the United States and the Emperor of China, by which the United States was required to secure to the subjects of the Emperor of China, sojourning in America, "the same rights, privileges, immunities and exemptions as may be enjoyed by the citizens or subjects of the most favored nations to which they are entitled by treaty."

This Court, speaking of the action of the authorities denying the right of Yick Wo and Wo Lee to maintain their laundries, uses the expression:

> "Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand so as practically to make unjust and illegal discrimination between persons in similar circumstances material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

And the action of the Board of Supervisors in refusing the right of Yick Wo, and the other Chinamen, while granting it to everybody, except one, who was not a Chinaman, was held —and we can not see how it could have been held otherwise— to have been the result of "an evil eye and an unequal hand."

In *Garvin* v. *Daussmann*, 114 Ind. 429, it was held that an assessment against property connected with the improvement of a street, where no opportunity was afforded to the property holder prior to or at the time of making the assessment to be present and to be heard in regard thereto, was not an unconstitutional deprivation of his property, as without due process of law, where the law provided that in the enforcement of the assessment the property holder, after it was made, had the opportunity of contesting the assessment. It was not held nor suggested that there was a right to be heard in regard to the assessment after it had been made. The point upon which the action was held valid was that notice and an opportunity to be heard had been given him, and that it was as good for him to have the right to question it after as if he had the right to be heard before. The case bears no semblance of suggestion of

support to the propositions so strenuously insisted upon by counsel for the plaintiff in error that there is the constitutional right of a hearing and an application for a review after a conclusion has been arrived at; but all that is said on that score is that such an opportunity is tantamount to the opportunity to be heard before the time of making the assessment, and obviates what would otherwise be a constitutional objection, of no notice whatever.

In *Chicago, Milwaukee & St. Paul Railway Company* v. *The State of Minnesota*, 134 U. S., at page 418, the question under consideration was not at all a question of taxation or of due process of law, as applied to the assessment or collection of taxes, but was and is in terms held to be purely a question of due process of law, as applied to purely judicial proceedings. In this case, the discussion arises upon the measure of due process of law required in judicial proceedings. It was held that the right of the railway company to fix rates was property as much as the right to own the *corpus* of its road. The one necessarily flowed from the other, and the only limitation which was within the power of the Legislature of Minnesota to make, in that behalf, was that the rates when fixed should be reasonable; that what was a reasonable and what was an unreasonable rate was a judicial question to be determined by the courts in the exercise of their judicial power. The shipper had the right to ship his commodities by the common carrier at a reasonable rate; that the law gave him and the railroad could not deprive him of it, and if it deprived him of it, it deprived him of his property; it deprived him of the right to earn money, which is property that the law will protect and preserve. The carrier claimed the right to fix the rates, which it unquestionably had, so long as the rates fixed were not unreasonable. There was, therefore, the contention between the shipper and the carrier as to what constituted a reasonable rate, upon the decision of which the profits of the one would be diminished and the other increased in exactly equal proportions. Such being the contention, the Commission undertook, under the law, to settle conclusively as against the railroad company and in favor of the shipper what amount would be reasonable, and it was upon this contention that the case was decided and under this the language used. While concurring in the conclusion arrived at, Mr. Justice Miller did

not concur in all the process of reasoning by which it was reached, and Mr. Justice Bradley, with whom were Messrs. Justice Gray and Lamar, dissented *in toto*, holding that the decision was in conflict with *Munn* against *The State of Illinois*, 94 U. S. 113. Given the proposition that the question was a judicial one, it can not be disputed that the party who was to be deprived of his property must have had his day in court, with an opportunity to be heard. But even if it were held not to be a judicial proceeding, the law of Minnesota, in authorizing the Commissioners to fix what is a reasonable rate, makes no provison whatever for any kind of notice nor any opportunity, at any stage, for the party in interest to be heard, and the mere fact that the railroad company was heard and notice was served upon it, where there was no provision of law requiring it, would not, under the rule laid down in *Kuntz* v. *Sumption*, 117 Ind. 1; *Stuart* v. *Palmer*, 74 N. Y., *supra*, make the proceeding valid, but it is entirely clear from the whole opinion of Mr. Justice Blatchford that the language used by him in regard to the necessity of notice before one can be deprived of his property, was used with reference to a proceeding and a question purely judicial in its nature.

III.

DUE PROCESS OF LAW—THE LAW OF THE LAND—IN GENERAL.

Text writers and Judges having occasion to make application of the expression "due process of law," call attention to the difficulty of giving a precise and accurate definition of it that shall at the same time be sufficiently comprehensive to cover all cases. In general terms it is synonymous with "the law of the land."

Cooley's Constitutional Limitations, chap. xi, p. 430.
Hare's American Constitutional Law, vol. 2, p. 836.
Dent v. *West Virginia*, 129 U. S. 114.

In Magna Charta the latter expression is used, while in the Fifth and Fourteenth Amendments to the Federal Constitution, the former; and the language in the Bill of Rights in the Constitution of Indiana, Article I, section 12, is "due course of law."

Anderson, in his Dictionary of Law, defines it as "a course of legal proceedings according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights." Speaking generally, it is the shield that is thrown around the citizen by the Constitutions, State and National, to protect him in his natural rights of life, liberty and property. Speaking more definitely and precisely, it is those provisions of statute or common law within and limited by the Constitutions, National and State, by or through which the citizen may be legally deprived of any one or more of these three cardinal rights inherent in every citizen, and they vary with reference to the particular process brought to bear upon it.

a. As to life and liberty.

Ordinarily the citizen may not be deprived of his life or liberty, except upon an indictment by a Grand Jury, or, in special cases, by information and a trial before a jury of his peers. Extraordinarily he can, by voluntary enlistment or impressment in time of war, as a soldier, and misconduct as such, when he may be tried by courts martial and imprisoned or executed under military law.

Martin v. *Mott*, 12 Wheaton 19.

But to constitute due process of law in such case the person must be subject to military law.

Ex parte Milligan, 4 Wallace 2.

This may also come in other special methods, as with Judge Terry in his assault upon Justice Field.

In re Neagle, 135 U. S. 1.

b. So, as to property these deprivations may be two-fold, namely, the ordinary and the extraordinary.

The ordinary deprivation is by judicial proceedings where the party must have his day in court, be served with process, or, in special instances, where the Court can not acquire jurisdiction over the person, but does over the *Res*, the notice may be given by publication in the manner fixed by the Legislature or the Court, by authority of the Legislature, in such manner as is reasonably calculated to afford him notice and the opportunity to defend. In such case "due process of law" is an investigation by judicial machinery; a judicial investigation

under the form and with the machinery provided by the wisdom of successive ages for the investigation, judicially, of the truth of the matter in controversy.

Chicago, Milwaukee & St. Paul Ry. Co. v. *Minn.*, 134 U. S. 457.

Pennoyer v. *Neff*, 95 U. S. 733.

The extraordinary are of various kinds:

1. In time of war, the right of the Government to destroy property standing in the way of actual military operations, is conceded by all writers. No leave was ever asked of the property holder or granted by him to occupy the Peach Orchard or the Wheat Field at Gettysburg, although such owner may have been resting in the peace of the State of Pennsylvania and of the United States.

2. In times of great public calamity, such as a general conflagration or a plague, the right to destroy buildings or other property necessary to stop the spread of the destroying element, or to interfere with personal liberty, is unquestioned.

3. Which should perhaps be denominated as "summary" rather than extraordinary, and stands rather between, for the purpose of taxation, in order to afford to governments the means of existence, the machinery provided by law for the assessment, levy and collection of taxes is a sufficient warrant to deprive the citizen of his particular property; to collect from him by distraint and sale of his property, where he fails or refuses to pay the taxes assessed against him, and as to this, the notice, assessment, and levy of taxes and delivery of duplicate to the collecting officer and a regular demand and sale, after the notice prescribed by law, fulfill all the requirements of "due process of law" or "the law of the land." The "law of the land," however, does not necessarily mean simply a statute enacted for the particular occasion or purpose, for it might be that such a statute would not be in harmony with the Constitutions; National and State, one or both, in which case it would not be "law of the land;" it would be no law. An enactment of the Congress, General Assembly, or any inferior body, in violation of the Constitution is simply a nullity, but where there has been passed and enforced a valid law of taxation, under and in compliance with which the citizen has been deprived of his property, such deprivation can not be said to be without due process of law. For enforcement of the laws

requiring the raising of revenues for the support of the government, the intervention of the courts, the lingering processes of the "laws delay" are not essential. Notice is to be given without doubt, but what that notice shall be and how it shall be given are questions for the law-making power to determine, and its decision will be final and conclusive, except, perhaps, in the instance where the court would be compelled to hold that the notice provided for was in fact or in law no notice, and the party in interest could not thereby be apprised of anything. Such notices vary with reference to the objects to be attained. Where Boards of Equalization are simply to equalize between localities, the provision of the law requiring them to meet at a particular time and place is sufficient notice to all parties in interest, although in equalizing they not infrequently seriously add to the burdens of individuals who are not expecting it. When the individual as such is to be affected, the notice provided is usually a personal one, although that is held not to be essential. Where special organizations are to have their assessments fixed by the body to whom that matter is committed, notice of the meeting of that body is ordinarily sufficient, and the party is bound, at his peril, to attend.

It is somewhat instructive, but not at all flattering, to note the progress of the law in the State of Indiana in regard to the assessment of property for taxation. "In our grandfathers' days" it seems to have been taken for granted that all persons, including corporations, would honestly return all their property for taxation at its fair value and, until the passage of the act of 1872, there seems to have been no substantial provision by which the authorities might question the correctness of the tax return, but since then, and in these degenerate days the main endeavor of all systems of taxation has been to make provision by law to compel a fair and equal assessment and to clothe the authorities with ample power to discover, ascertain, and assess hidden, concealed, and omitted property and values. With reference to natural persons, this is accomplished by conferring upon County and Township Assessors, Auditors, Treasurers, and Boards of Review large powers of investigation, and with reference to artificial persons, by requiring some public board to make the assessment in the first instance, requiring the party to be assessed to furnish the Board assessing necessary

information and giving to the party notice of the time and place of the meeting at which the assessment is to be made.

IV.

DUE PROCESS OF LAW AS APPLIED TO THE ACT IN QUESTION.

In general terms we remark that the law provides in the case:

a. Of natural persons as to ordinary property, that the assessment shall be made in the first instance by local assessors, with powers of review for either increase or decrease in the County Board of Review, and for further review by appeal to the State Board of Tax Commissioners.

b. Of ordinary persons local in their character, such as the ordinary commercial corporations, that the assessments shall be made in the first instance by the County Board of Review of the county in which the corporation is located, with the right of review in the State Board.

c. Of persons owning property of a special character such as railroads having an existence in a number of counties, but constituting after all but a single unit of existence and ownership, without reference to whether this ownership is in natural or artificial persons, that while its local property is assessed by the local authorities in exactly the same manner as is other local property, its unit property shall be assessed in the first instance by the State Board after reports have been filed with the proper officials, county and State, which reports are required to be laid before the State Board at its annual meeting.

In detail the act is as follows:

A.

AS TO INDIVIDUALS.

By section 48, between the 1st of April and the 1st of June, the Township Assessor is required to personally call upon and furnish each person with an assessment blank upon which such person is required to make to such Assessor a full and correct description of all his personal property together with his estimate of its value; the Assessor is thereupon required to determine and settle the value of each item, after examining the

statement and also after an examination, under oath, of the person or any other person, in case he shall deem it necessary. For the purpose of this assessment, the Township Assessor is not required to give the party assessed any notice whatever, except the delivery of the blank list.

By section 56, in case the person to whom the blank list has been delivered refuses to fill out the statement or to subscribe to any oath, the Township Assessor must ascertain in the best manner possible the property owned by the person so refusing, and to this valuation, when so made, the County Auditor shall add fifty per cent., which shall stand as the valuation for taxes. Under this section no notice is required to be given to the person being assessed, except as above.

Under section 105, the Township Assessor, on or before June 1, is required to make out and deliver to the Auditor a list of the persons assessed by him.

By section 106, the County Auditor may require the Township Assessor to correct errors or omissions in the list returned.

By section 108, whenever the Township Assessor, before filing his return with the County Auditor, has reason to believe that property has been omitted, he must, if the person resides in the township, give him notice and then assess the omitted property.

By section 113, the County Auditor is required to deliver to the County Assessor the assessment returns which he shall examine, and with reference to omitted property, has the same power that is given to the Township Assessor, and must return the lists on or before the first Monday after the 4th of July in each year to the County Auditor.

This ends the due process of law as to the lists of personal property which is begun by the original delivery of the blank lists to the individual.

By section 114 the County Board of Review takes charge of the lists, but can make no additions or changes without the notice to the person in interest, prescribed in the section.

By section 115 the County Board of Review may equalize, as between townships, the result of which may greatly increase particular assessments in particular townships, but of such increase or intention to increase the statute requires no notice except the general notice of the meeting of the County Board of Review.

B.

AS TO DOMESTIC CORPORATIONS.

By section 73 domestic corporations are required to make out, between the 1st of April and the 1st of June in each year, and deliver to the Assessor their corporate lists as described in the section.

By section 74 these statements are scheduled by the Assessor and then returned to the County Auditor, who, on the meeting of the County Board of Review, lays such statements before the Board, whereupon the Board is required, without any further notice to any party in interest, to assess the capital stock of such companies, and the Auditor is thereupon required to compute and extend the taxes upon the basis so made by the County Board of Review.

By section 114 the County Board of review is provided for, and the manner of giving notice of its meeting. It is also authorized at this meeting to hear complaints of the owners of personal property except railroads, and to equalize values.

By section 115 the Board is required to equalize assessments.

In no part of section 114 is anything said about its fixing the valuation of domestic corporations, and nowhere in the entire act is it in terms stated that the County Board of Review shall hear domestic corporations, or that domestic corporations are entitled, as a matter of right, to a hearing before the County Board of Review. Nevertheless in *Hyland* v. *The Brazil Block Coal Co.*, 128 Ind. 335; *Hyland* v. *The Central Iron and Steel Co.*, 129 Ind. 68; and *Smith, Treasurer*, v. *Rude Bros. Mnfg. Co.*, 131 Ind. 150, the Supreme Court of Indiana in terms held that these provisions constitute due process of law; that the officers of the corporations were required to furnish their lists, which in the course of orderly administration would be laid before the County Board of Review. They were bound to take notice of the action of the County Board of Review in making the assessment, and that the provisions of the act were a sufficient compliance with the rules in regard to giving notice, and this they held with special reference to the rule in *Kurtz* v. *Sumption*, 117 Ind. 1.

C.

AS TO RAILROADS.

By section 76, railroad companies are required to cause their property to be listed as of the 1st of April.

By section 77, between April 1 and June 1, railroad companies are required to file, with the County Auditor, the statement or schedule specified in this section.

By section 78, right of way, "railroad track," is defined.

By section 79, provision is made for the taxation of railroad track in the several divisions.

By section 80, provision is made for the listing and taxation of "rolling stock" and it is defined.

By section 81, other personal property of railroads is required to be listed and assessed in its particular locality, as is the real estate; other than railroad track, under section 82.

By section 83, the railroad company is required to return to the County Auditor a list as described in the section, which list the County Auditor, by section 84, is required to return to the proper Assessor.

By section 85, at the same time that these various lists are furnished to the County Auditor, the railroad company is required to furnish a statement, described at length in the section, of railroad track and rolling stock to the Auditor of State, which list the Auditor of State, by section 87, is required to lay before the State Board of Tax Commissioners at their meeting, and such State Board is required to assess such property as in the act afterwards provided.

By section 88, the County Auditor is required to extend the taxes against railroad property, when assessed, corrected and equalized, and the Treasurer is required to collect the taxes.

By section 120, item 4, the State Board of Tax Commissioners is especially charged with seeing that all the railroads are assessed and taxed as provided by law.

By section 129, the State Board of Tax Commissioners is required to convene on the first Monday in August, and to assess railroad property. It is not to be bound by any reports or estimate of the value of railroad property, but to appraise

and assess it at its true cash value according to its best knowledge and judgment, and is given the power to send for persons, books and papers, and is given all the powers given to County Boards of Review. (See section 114.)

By section 132, this open session is limited to 40 days.

By section 134, the County Auditors of the State are required to transmit to the Auditor of State, abstracts with information in regard to railroads as returned by the railroad company to the Auditors.

By section 135, the Board is required, in equalizing, to consider the property named in the section including railroad property.

By section 137, the Board is required to assess the railroad property denominated "railroad track" and "rolling stock" at its true cash value, and is given the power and authority, by committee or otherwise, to examine persons or papers. When the amounts are determined and assessed they are to be certified by the Auditor of State to the County Auditors, who are required to distribute the amounts so certified to the several townships, cities and towns in the proportions to which they are entitled, and the County Auditors are required to compute and extend the taxes as thereinbefore provided.

Nowhere in the act is it in so many words said that the State Board of Tax Commissioners shall give any particular notice to any particular railroad company, nor is it anywhere said in so many words that the State Board shall give the railroad companies a hearing; but in this respect the provisions of the act of 1891, in regard to railroad companies, are substantially identical with the provisions of the act of 1881 in regard to domestic corporations, which provisions were under consideration in the Hyland and Smith cases, *supra*.

From this it will be observed that the classifications mentioned in the act, of which the plaintiff in error complains with such insistent and reiterated acrimony, are not classifications of the act of 1891, but of the things themselves. The classifications existed before the act was passed, and the act simply adjusted itself to a condition that was in existence when the act was passed, viz.: the distinction between local and unit properties running into different counties. By the act, natural persons are required to make their returns to the local assessors, whose assessment was final, unless changed by the local

Board, while artificial persons of a local character are required to make their returns to and be assessed by the local Board, with a revisory power in the State Board, and persons owning property not local but general in its character, make their returns in the first instance, of their general matters to and are assessed by the State Board, while their local matters stand upon the same footing with similar property of local corporations, both as to returns, assessment and revision.

The act thus became, and thus only could it become, a symmetrical whole, just, fair, and equal in its operations, and "An orderly proceeding adapted to the nature of the case in which the citizen has due opportunity to be heard and to defend, enforce and protect his rights."

What kind of hotchpot of assessment would exist if every Township Assessor through which the lines of the several railroads run, had made an assessment thereon, final and conclusive, unless reviewed by the County Board, and even if so reviewed by each County Board through which the lines extend, what could have come from it except endless confusion, uncertainty and dissatisfaction? As the property to be assessed was and is a unit, the tax-payers and authorities of York Townships, in Benton and Dearborn counties, had an interest similar in character with the tax-payers and authorities of Center Township, in Marion County in regard to the assessment of railroad track and rolling stock in Center Township, and the same is true in regard to every township through which the railroad track and rolling stock of the road of plaintiff in error runs. No law could by possibility be enacted or enforced that would provide "For a uniform and equal rate of assessment and taxation," and * * * "Secure a just valuation for taxation of all property," by relying on the separate returns of Assessors through whose townships the line of roads of plaintiff in error are located and operated. In the contingency that each Assessor, acting by himself, should, without the co-operation and assistance of the other Assessors, locate a value upon the railroad track and rolling stock in his particular township, the difficulty would be *pro tanto* lessened by the revisory power of the County Boards, but it would be the same in kind, if not in degree, and the situation and character of the property to be assessed is such as to necessitate some provision by which a uniform method of assessment should be provided for. This

difficulty might, by possibility, have been met, in part, by providing for a congress of Township Assessors, or of County Auditors, or delegates from County Boards of Review, to be held at some central location on the line of the road of plaintiff in error, with power to send for persons and papers, and make an assessment that would be uniform and equal, so far as such counties are concerned. The most sanguine imagination, we take it, would not suppose that it could thus be made either equal or uniform, when compared with other roads. It is not necessary for defendant in error to contend that the plan which was adopted is the best plan, or even that it is a good plan. It is only necessary to sustain the proposition that it is not an unconstitutional plan; that it is "an orderly proceeding, adapted to the nature of the case in which the citizen has an opportunity to be heard and to defend, enforce, and protect his rights."

V.

THE DENIAL OF "DUE PROCESS OF LAW" AS CLAIMED.

The objections insisted upon under the head of "Due Process of Law" are

First. The absence of notice.

AS TO THE NECESSITY FOR NOTICE.

The leading case on that subject in the State of Indiana is that of *Kuntz* v. *Sumption*, 117 Ind. 1, where the Supreme Court of Indiana holds that no notice whatever having been provided for in the statute, the change made by the County Board was inoperative, the law, in that respect being unconstitutional, because it authorized the deprivation of property without a notice, and therefore contrary to due process of law. And speaking of that case and with the avowed purpose of limiting its decision to the particular point decided, the court, at page 3, uses the following:

"We do not assert that the proceedings would be void where there is some notice, although not given in strict conformity to law, for we know that a defective notice, assumed to be given under a statute, will be sufficient to uphold jurisdiction as against a collateral attack. * * * We approve as fully as language

can do, the doctrine of former decisions that the Legislature has ample authority to prescribe what the notice shall be. ° * * We affirm, too, that whether the notice is by publication or by personal service, it will sustain jurisdiction, provided there is back of it some law providing for notice."

And in *Stuart* v. *Palmer*, in 74 N. Y., which, as heretofore suggested, is the leading case upon this subject, the Court says, at page 188:

"The Legislature may prescribe the kind of notice and the mode in which it shall be given, but it can not dispense with all notice."

The case of *Kuntz* v. *Sumption*, in which the Supreme Court of Indiana pointed out the necessity for notice was decided March 22, 1889. The General Assembly of the State was at that time in session, and, acceding to the views thus pronounced, promptly amended the act of 1881 in the respect pointed out and made provision, by law, for the giving of notice to the parties in interest where it was supposed that property had been omitted from taxation.

Elliott's Supplement, sections 2127 and 2129, pages 677 to 680 inclusive.

And these provisions have been carefully and sedulously retained in the act of 1891.

As we have seen, as to individuals, due process of law begins with the delivery, by the Township Assessor to the individual, of the blank list, and that process terminates with the action of the County Assessor in making returns to the County Auditor on or before the first Monday after the 4th of July, and thenceforth, if any question is to be made before the County Board of Review as to the correctness of the tax list returned, it must be upon a new notice, and the proceedings, under this new notice, constitute a new "due process."

The "due process of law" in regard to corporations under the act of 1891, while in some respects similar, and in all respects analogous, are not identically the same as that provided for natural persons. Local corporations, as we have seen, are required to make out and deliver to the Assessor their corporate lists. (Section 73 of the act of 1891). The statements so made out and delivered to the Assessor are required, under section 74, to be scheduled by him and returned to the County Auditor, and this schedule and statement the Auditor is required to lay annually before the County Board of Review at its meeting, and the Board is required to value and assess, and

this assessment, when made, terminates that process of law which began with the delivery of the statement to the Assessor by the corporation. These provisions have been carefully considered by the Supreme Court of Indiana in the cases of *Hyland* v. *The Brazil Block Coal Company*, 128 Ind. 335; *Hyland* v. *The Central Iron and Steel Company*, 129 Ind. 68, and *Smith, Treasurer*, v. *Rude Bros. Mfg. Co.*, 131 Ind. 150, in all which cases that Court, having before it the case of *Kuntz* v. *Sumpton* and the claim insisted upon by the corporations, that the law providing for the assessment of local corporations was unconstitutional in that it enabled its properties to be taken without due process of law, in that no notice was provided for, held—

1. That under the tax law of 1881, no special notice of the time of the meeting of the Board is necessary to the corporation.

2. The corporation is bound to take notice of the time and place of the meeting of the Board, the law governing the Board being sufficient notice to corporations.

3. That the delivery, by the corporations to the Assessors, of the sworn statement of their capital stock, and the schedule, and the delivery by the Assessor to the Auditor, and the laying before the Board of Equalization of such statement and schedule by the Auditor, constitute due process of law.

The process of assessment of railroad property, as to railroad track and rolling stock, is essentially the same as that provided for local corporations; the tribunal provided for the assessment for railroad companies, as to its unit property, being the State Board, while for local corporations it is the local Board. In addition to the statements required to be furnished by section 77, to be filed with the County Auditor, the substance of which goes from the County Auditor to the State Board, under section 134, railroad companies are required, by section 85, to furnish a statement to the Auditor of State, which statement, by section 87, the Auditor of State is required to lay before the State Board of Tax Commissioners and the State Board of Tax Commissioners is required to assess the property.

In Cooley on Taxation, pages 364 and 365, it is said that the usual and the better form of notice is in the law itself under which all parties in interest are bound to take notice of the

public meeting of the Board. See, also, Desty on Taxation, vol. 1, pages 599 and 600.

Paulsen v. *Portland*, 149 U. S. 30.
Kentucky Railroad Tax Cases, 115 U. S. 331.
State Railroad Tax Cases, 92 U. S. 575.
Bells Gap R. R. Co. v. *Penn.*, 134 U. S. 289.
Adsit v. *Lieb*, 76 Ill. 198.
Pacific Hotel Co. v. *Lieb*, 83 Ill. 608.
Porter v. *Railroad Co.*, 76 Ill. 598.
State v. *Runyon*, 41 N. J. Law 104.
Railroad Co. v. *Commonwealth*, 81 Ky. 511.
Mayor, etc., v. *Davenport*, 92 N. Y. 610.
St. L., I., M. & S. Ry. v. *Worthen*, 52 Ark. 529.

Counsel for plaintiff in error have heretofore, in argument, and will, we presume, in this court call attention to a line of cases, viz.:

Davidson v. *New Orleans*, 96 U. S. 97.
Hagar v. *Reclamation District*, 111 U. S. 701.
Kentucky Railroad Tax Cases, 115 U. S. 321.
Garvin v. *Daussmann*, 114 Ind. 429.

where provision was made, by law, for the enforcement of the assessment by proceedings in court, in which it is laid down that the assessment is not final and conclusive, but may be questioned in the proceedings in court to enforce the lien.

It will be observed that in all these, except the case in 115 U. S., there was no provision of law for the giving of notice before levying the assessment, and upon a well settled constitutional principle which we do not controvert, the assessments would, each and all, have been void because of the failure to provide for notice unless the right was conceded to question the assessments when proceedings were taken in the courts to enforce them. No such doctrine is suggested in any adjudged case except that in 115 U. S., where the law provided for notice before or at the time of making the assessment, and in that case, while it is true that Mr. Justice Matthews does say, at page 335, that under the Kentucky statute the tax could be collected only by suit, and hence the assessment of taxes was not final, he, in his opinion, at page 332, had stated that, "There was in fact and in law notice and a hearing." And at page 333:

"This return made by the corporation through its officers, is the statement of its own case in all the particulars that enter into the question of the value of its taxable property, and may be verified and fortified by such explanations and proofs as it may see fit to insert. * * * * These meetings are public and not secret. The time and place for holding them are fixed by law. The proceedings of the Board are required to be made matters of record, and authenticated by the signatures of the quorum present. Any one interested has the right to be present."

The case was a writ of error from the judgment of the Court of Appeals of Kentucky, which is reported in 81 Ky., at pages 492 to 519. It is certain from the language of the decision of the Kentucky Court, that the assessment made by the Board was final and conclusive, and that while provision was made by law for enforcing the lien by suit, instead of giving a peremptory right of sale to the tax collector, yet in that suit the amount of the assessment could not be controverted. The section of the statute in terms so provides, and it is apparent that the power given to enforce the lien by judicial proceedings was not for the purpose of enabling the railroad to controvert the amount of the assessment, but was the method selected by the Legislature of Kentucky for enforcing a lien upon unit property.

In the case in 81 Ky., it is strongly suggested that the other property of the company, as well as the road bed, is a part of one unit, and it is difficult to conceive how one Treasurer could sell a unit or a part of a unit for delinquent taxes, and this difficulty sufficiently accounts for the provision of the Kentucky Statute for the enforcement of tax liens by judicial proceedings instead of by a summary sale. In any event, it is clear that it was held, both by the Court of Appeals of Kentucky and by the United States Supreme Court, that the assessment by the Kentucky Board was final and conclusive and could not be revised by the court to which application was made to enforce the lien and it stands as the settled law of the land that where notice has been given and an opportunity to be heard afforded, before an assessment is made, there is no requirement of the Constitution that the assessment may, thereafter, be revised or corrected by a court, the provision for such revision or correction being necessary only in those cases where there had been no prior notice of the time and place of the assessment.

Second. Counsel for plaintiff in error have always discussed the question of the requisites of a hearing as though the hearing required was a hearing in all repects in strict analogy to the hearing in judicial proceedings before a court. If this contention is correct then it would logically and necessarily follow that there could be no hearing within the meaning of due process of law, unless the party to be assessed was provided the right.

a—Of producing witnesses to be examined and cross-examined as in pure judicial proceedings, upon the measure of value that he was insisting was proper and sufficient.

b—That whatever the Assessing Board should consider in coming to a conclusion as to the value should be brought forward in the shape of evidence with the right in the party to be assessed to confront the witnesses and have the right to cross examine.

c—That the Board in arriving at its conclusion should act in a purely judicial capacity, and should affix the valuation without reference to their own knowledge or judgment, but upon the weight of the evidence that had been brought before them.

We beg to submit that in no work of any text writer, and in no adjudicated case can language be found that will support any such contention, and that if such were the rules by which Assessing Boards were to be governed in making their assessments, nations would die for lack of support and be forgotten before they could even approximately collect the taxes which had been legally assessed.

Section 85 provides for the making out and delivery to the Auditor of State, by the person to be assessed, of sworn statements of all the particulars in reference to the property to be assessed; which, by section 87, the Auditor of State is required to lay before the State Board of Tax Commissioners for their assessment. Ample opportunity is afforded in this statement for the party who is to be assessed to formally present every fact or circumstance which, in his opinion, is essential to be presented in order to protect or preserve his rights, unless it be true that a hearing and decision should be made by the Board

solely upon formal evidence formally adduced, the weight and probative effect of which the Board is bound to determine in the same manner as would be done by a court upon a judicial investigation.

The sessions of the Board are open and public in case any railroad should desire to be further heard in addition to the statements which it has theretofore made under section 85. The Board is in session pursuant to law for the purpose of assessing the railroad track and rolling stock of the various roads and parts of roads in the State, and it would be a violent presumption not to be made by any court that any reasonable application for further or additional hearing would be denied and the evidence in the case of the C., C., C. & St. L. shows that in addition to the statements prepared by the company and laid before the Board, Mr. Dye, the general counsel for the plaintiff, was present and asked to be heard, and was, in fact, heard by the Board, so that both in law and in fact the plaintiff in error had actual notice and an opportunity to be heard fully, unless it should be the law that, as a matter of right, the State Board could not hold any session, executive or otherwise, for considering the assessment of property unless the owner was present with the opportunity to cross-examine witnesses, and that the Board could consider nothing except what would be admissible and competent evidence in a suit in court between private parties upon a question of private right. If this contention were correct as to railroads it must be correct as to all other citizens, and if so few and far between would be the taxpayers, for it is universal, under the system of taxation, not only in the State of Indiana, but in all States, that the assessing officers, as a rule, do not proceed to make their assessments with the assistance of clerks, bailiffs, witnesses, and juries, or any substantial synonym or substitute therefor.

Hannibal & St. Joe R. R. Co. v. *State Board*, 64 Mo. 294.
Porter v. *The R. R. Co.*, 76 Ill. 561.
Kas. Pacific Ry. Co. v. *Commissioners*, 20 Kan. 144.
R. R. Co. v. *Surrell*, 88 Ill. 535.
Republic Life Insurance Co. v. *Pollak*, 75 Ill. 298.
Case v. *Dean*, 16 Mich. 12.
Mayor, etc., v. *Davenport*, 92 N. Y. 610.
Sterling Gas Co. v. *Higby*, 134 Ill. 568.
I. & St. L. R. R. & C. Co. v. *Stookey, Coll.*, 122 Ill. 358.

Lowell v. *Commissioners, etc.*, 152 Mass. 380.
State Railroad Tax Cases, 92 U. S. 575.

The system provided for the assessment of taxes begins with the Township Assessor, and it is supposed that in most, if not all instances, he will have sufficient information and judgment to properly assess the property committed to him for assessment, and he is authorized to act upon his own knowledge. Lest, perchance, he may not have sufficient information, there is given to him the power to call upon others for information, but this power is for his assistance and in aid of his lack of information, if he conceives that he has such lack, and by no means for the purpose of enabling the tax-payers to call witnesses in support of their valuations or views. For the assessment of local corporations the system provided presupposes that the Township Assessor may not have sufficient information or judgment to properly make the assessment, and it is therefore committed in the first instance to the County Board of Review, composed of three citizens, who presumably will have a wider scope of information and are therefore better able to deal with the questions intrusted to them. Upon them is conferred the power to send for persons and papers and to call in outside assistance to aid them in the discharge of their duty, but this power is in harmony with that given to the Township Assessor and to enable them the better to discharge their duty, but in no contingency partakes of the nature of a trial in court.

The third provision is made with reference to that species of property with which, all reasonable men would concede, it is not possible that local Boards of Review, either isolated or in the aggregate, could deal satisfactorily; but inasmuch as they must be assessed, some proper authority should be selected, clothed with the power and charged with the duty of making the assessment, and for this purpose the law of Indiana has devolved that duty upon its Governor, its Secretary and Auditor of State, to act in conjunction with two skilled citizens, otherwise not officers of the State, but selected and appointed by the Governor with special reference to the performance of duties entirely devoted to taxation, and on this Board thus constituted the power to assess railroad property is conferred, with substantially the same powers and means of

"We doubt very much whether any action of a State, not directed by way of discrimination against the negroes, as a class, or on account of their race, will ever be held to come within the purview of this provision."

All that Professor Hare says on the subject is contained in lecture 24 on the amendments, in which he says (at page 516, citing *Santa Clara County* v. *Southern Pacific Co.*, 118 U. S. 394).

"Companies chartered by the State are persons relatively to her, and she can no more deny them the equal protection of the laws or subject them to unequal taxation than she can natural persons."

Hare's Am. Const. Law, vol. 1, 516.

Mr. Justice Miller in his lectures on the Constitution, in discussing the fourteenth amendment, is silent as to the denial of the equal protection of the laws.

It is astonishing how profoundly ignorant able text-writers, learned lecturers on Constitutional Law, and eminent judges have been as to the length, breadth and depth of this far reaching provision.

THE FOURTEENTH AMENDMENT.

The fourteenth amendment was the direct outgrowth of the situation that developed as the result of the war and the freedom and enfranchisement of the slave population and its primary purpose was unquestionably their protection by prohibiting the States from denying to them the equal protection of the laws.

Almost from the adoption of the Constitution there had been a controversy over the status of the colored man, and this controversy had grown with the growth of the nation and strengthened with its strength, increasing in bitterness and intensity until finally, in 1861, it developed into actual war, the primary purpose of which was to keep the colored man permanently in slavery. For four years a section of the nation composed of men exceptionally brave, and by education and surroundings, proud and overbearing toward their inferiors, whether in political or other conditions, waged a bloody and destructive war for the perpetuation of slavery, at the end of which they found themselves with sadly thinned ranks, devastated homes, and slavery destroyed in fact, if not in law, with the colored man and a large number of their successful enemies in their midst. As the result of the war the adoption of the

thirteenth amendment was a logical necessity, but under the bitterness engendered by the strife and the changed condition of affairs the colored man could not well be suffered to remain with no other guarantee of protection than the thirteenth amendment. In the nature of things it was inevitable that the white population of the South, with a substantial monopoly not only of wealth but of intelligence, suffering under the bitterness of defeat, should have endeavored, as far as it was possible by the passage or enforcement of laws, to make the condition of the slave population a substantial approximation to what it had theretofore been, and by the same means to subject their enemies that after the conclusion of the war had remained or returned to the localities with which they had become acquainted in war, to invidious measures either of legislation or of judicial application, and it was just as inevitable that the successful party in the great contest should endeavor to throw around these two classes of men such protection by law as that no such effort of invidious discrimination would be possible, and Civil Rights Bills were passed looking to that end, but their constitutionality was doubted, and for the further accomplishment of that purpose the Fourteenth Amendment was proposed and adopted. It is undoubtedly true that the leading object of the passage of that amendment was the protection of the colored men, but the protection of white men who rested under the odium of local bitterness was as carefully conserved as that of his colored brother, and it is evident from the language used that whatever may have been the intention of some, in connection with its passage, the law was carefully and intentionally drawn so that it would cover artificial as well as natural persons. The first section of the amendment provides for citizenship and imposes a limitation upon the States against abridging the privileges or immunities of citizens of the United States. The Constitution originally (article IV, section 2), provided that the citizens of each State should be entitled to all the privileges and immunities of citizens of the several States, and the Fifth Amendment adopted so concurrently with the adoption of the Constitution as to make it practically a part of the original Constitution, had placed a limitation upon the general government prohibiting the deprivation of life, liberty or property without due process of law. From the outset the

provision in regard to citizenship had been construed as not including corporations and that a corporation was not a citizen, as indeed, speaking accurately, it could not be. It, nevertheless, is a person, and the change of phraseology in the first section of the Fourteenth Amendment from citizen to person necessarily had a meaning and purpose, and the only purpose could be to include artificial as well as natural persons, foreigners as well as citizens. So clearly true is this that when the Santa Clara case (118 U. S. 394) came on for argument in this Court the Chief Justice announced before the argument commenced that the Court did

> "Not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations; we are all of opinion that it does."

It being then established that the force and effect of the Fourteenth Amendment is not to create any new right, but simply to confer upon the General Government the power to enforce rights that had always theretofore existed in free governments, the protection of which, however, in this country, had hitherto devolved solely upon the States, we will now consider what these universally recognized rights are, to the equal protection by law of which the power of Congress and the General Government may be invoked where the State governments are derelict or are themselves the aggressors. We must keep constantly in mind that they are not new rights created by the Fourteenth Amendment or any Legislation of Congress authorized thereby, but are only such rights as inherently appertain to every person because he happens to be subject to the jurisdiction of the laws in a republican form of government.

It is maintained by plaintiff in error that they are:

1. The right to the owners of railroad properties to have furnished them a tribunal to which they can appeal from an assessment of their properties.

2. The right to be assessed by local assessing officers, Township Assessors or County Boards of Review.

3. The right to a forum or tribunal in the nature of an appellate or revisory one to which such owners can apply by appeal or otherwise for relief from an original assessment, in which evidence shall be heard judicially with the power to produce evidence to sustain such assessment only as they claim is

proper to be made against them, to cross-examine witnesses and rebut the evidence heard against them and to have such evidence weighed judicially and the assessment made only upon such determination.

This contention is not insisted upon as an absolute right, but a relative one growing out of the facts that the individual taxpayer is assessed by the Township Assessor, has the right to apply for relief to the County Board of Review from the valuation fixed by the Township Assessor, and to appeal to the State Board of Tax Commissioners and local corporations are assessed by County Boards of Review and are given a right of appeal to the State Board of Tax Commissioners, while it is conceded that under the law the owners of railroad property, whether corporate or individual, are assessed in the first instance as to their unit property by the State Board of Tax Commissioners, whose assessment when made is final and conclusive, with no right of appeal to any other body, Board or tribunal.

It will be conceded that the law does provide for two appeals for natural persons and one appeal for local corporations, whereas there is no appeal for a general corporation, such as a railroad, as to its unit property, its local property being assessed by the local Board; as to that, of course, there is the right of appeal. This objection can only be tenable by having it appear not only that there is a difference in the machinery provided, but that, substantially, a less measure of relief, under the law, is accorded to railroad companies than is given to other persons of the same general character under substantially similar circumstances. There is no vested or constitutional right in a remedy. Even under the stringent provision of the Federal Constitution prohibiting the enactment of any laws by the States impairing the obligations of a contract, it has uniformly been held that the States were at liberty to change or substitute the remedies provided for the enforcement of contracts, provided only that the effect of such change was not such as to materially impair or interfere with the contract. A law providing that persons living south of the National Road should have the right of appeal from their assessment to the County Board of Review, and thence to the State Board of Tax Commissioners, while those living north thereof must abide by the original assessment, would unquestionably be open to the objection of discrimination, for there can be no

substantial reason, based upon locality of residence, for a difference in the method of assessment or the rights to be accorded to the tax-payer, or if a different system of assessment for the same kind of property or the same classes of persons were provided by law, purely arbitrary, without any just reason in the nature of the property to be assessed, the provision would be within the spirit of and protected by the Fourteenth Amendment. But where the property, as in the case at bar, is of such a character that it would be unreasonable, vexatious or unjust, or even a work of supererogation to require the assessment, in the first instance, to be made by officers, well enough equipped for the purpose of assessing the ordinary property of their localities, but who, in the nature of things, would have no knowledge or experience that would qualify them for the discharge of the duty of assessing railroad property, it would be monstrous to maintain that the law compelled such a process of assessment to be adopted. The law never requires impossible things, nor, except where the strict letter of the law absolutely compels it unreasonable things.

With just as much reason as the plaintiff in error in this case inveighs against the supposed injustice of the discrimination alleged, every individual tax-payer in the State might complain on his behalf that an unjust and oppressive burden was laid upon him by the law because he could only get the sense of the State Board of Tax Commissioners by a long, tedious and expensive course of appeals, while railway owners, as favorites of the law, had the right in the first instance, without any circumlocution or dancing attendance upon the minor officials of the State, to be assessed by the highest assessing power in the State.

It is no unusual thing, even in jurisprudence, to find different remedies provided for persons in different circumstances. A citizen of Indiana, having a claim against a citizen of another State, may obtain the decision of the Supreme Court of the United States only at the end of a long litigation in the lower court and thence by appeal by a process expensive in its character and vexatious in its delays, and even then only in case the amount involved or the legal questions presented are of that limited character of which the Supreme Court has jurisdiction, whereas foreign embassadors and States have the right, in the first instance, without reference to the Circuit Courts,

to apply to the Supreme Court of the United States for relief. Could it be reasonably objected by the foreign embassador or the State that the law was oppressive in that, while other citizens applying to the Circuit Court had a right of appeal to the Supreme Court, the decision of the Supreme Court as to them was final and conclusive?

Prior to the passage of the act of 1891, a citizen charged in the United States Court with a felony, upon conviction of which his whole life would be clouded and his future career destroyed, was denied, unless he could get two Judges to certify to a difference of opinion, the right, under the law, to take the opinion of the Supreme Court of the United States upon his alleged infamy, while his neighbor, standing exactly the same with him in their community, with nothing involved but a controversy over money exceeding five thousand dollars, had an absolute right of appeal.

The contention of plaintiff necessarily proceeds upon the assumption that the right of appeal is inherent, which is in no instance true as an abstract proposition even in general jurisprudence, not to speak of tax matters where delays might embarass governments in their operations. Complaint might well be made if the law provided that all persons, natural and artificial, should, in the first instance, be assessed by the Township Assessor whose assessment should be final and conclusive in regard to artificial persons, while as to natural persons, an appeal was provided to the County Board of Review or the State Board of Tax Commissioners, one or both. The tribunal of last resort to which any person, natural or artificial, can apply, under the act of 1891, is the State Board of Tax Commissioners. In the case of natural persons, that tribunal can only be reached through the intervention of two appeals; in the case of artificial persons, other than railroad companies, that tribunal can be reached only by one appeal, while the right to take the sense of that tribunal is accorded to railroad corporations, in the first instance, without the expense, trouble or delay of either appeal or review.

Section 114 of the act of 1891 confers upon the County Board of Review the right to hear complaints by tax-payers who claim that their property is assessed too high.

Section 129 provides that the State Board of Tax Commissioners shall have all the powers of the County Board of Review.

These sections are *in pari materia* and should be construed together. Not only that, but the Supreme Court of Indiana in this case has held that under the language used in section 129, the power given to County Boards of Review to hear the complaint of a tax-payer who deems that his property has been assessed too high is conferred upon the State Board of Tax Commissioners by section 129 as to the owners of railroad property. This construction by the Supreme Court of Indiana, as to the act of 1891, is conclusive upon this Court. This Court will accept such construction and apply the law to it when so construed by the Supreme Court of the State just as though the General Assembly, in enacting the law, has said in exact words that with respect to railroad property, the State Board of Tax Commissioners was required to hear complaints against the assessments. The power given to either County Boards of Review or State Boards of Tax Commissioners to hear the complaint of a tax-payer necessarily presupposes and is grounded upon the right of a tax-payer to make the complaint. It is frivulous to say that

> "We conceive that these Boards are given the power to hear complaint. What we complain of is that there is no right given to the tax-payer to make complaints,"

for the power to hear complaint could not exist without the right to make the complaint which was to be heard existed.

Laws similar to that under consideration in respect to the different tribunals afforded for the purpose of assessing railroad property and that of individual citizens are in force in the States of Alabama, Arkansas, California, Colorado, Connecticut, Texas, Georgia, Illinois, Iowa, Kansas, Kentucky, Maine, Missouri, Nebraska, New Hampshire, New Jersey, Massachusetts, Mississippi, South Carolina and Tennessee. We are unable to state what are the provisions in the six States last admitted, as their statutes are not accessible to us. The fact that so large a number of the States have made similar provisions is proper to be considered in connection with the charge that an unjust discrimination has been made by law in the State of Indiana, inasmuch as it could hardly be supposed that all the Legislatures making similar laws have conspired with the authorities

of Indiana, or are imbued with the evil spirit which is charged against the General Assembly of that Commonwealth. Wherever the constitutionality of such laws has been questioned the laws have been upheld.

Gulf R. R. Co. v. *Morris*, 7 Kas. 210.
Francis v. *R. R. Co.*, 19 Ia. 303.
Dubuque v. *C., D. & M. R. R. Co.*, 47 Ia. 196.
Central R. R. Co. v. *Board*, 67 Ia. 199.
Carlisle v. *Pullman Co.*, 8 Col. 320.
C., N. O. & T. P. R. R. Co. v. *Commonwealth*, 81 Kentucky 492.
St. L., I. M. & S. Ry. v. *Worthen*, 52 Ark. 529.
Porter v. *The R. R. Co.* 76 Ill. 564.
L. & N. A. R. R. Co. v. *The State, etc.*, 25 Ind. 180.
Home Ins. Co. v. *N. Y.*, 134 U. S. 594.
Bells Gap R. R. Co. v. *Penn.*, *Ibidem* 232.

It was contended that the County Board of Review, when in session under the provisions of section 114, brings into operation other and different functions while hearing the complaints of owners of personal property, than those which are brought to bear in the making of original assessments of local corporations required to be assessed by it, and that the State Board of Tax Commissioners, when hearing appeals under the provisions of section 125, acts in a different capacity, and brings into exercise different functions from those that are exercised in the assessing of railroad property as named in section 129, and hence that at some stage of the proceeding local corporations and individuals are accorded a valuable right or privilege, viz.: The exercise of the pure judicial function of considering and weighing evidence, and making an assessment, which is a finality founded on the conclusion of the hearing tribunal as to what is shown by the weight of the evidence adduced, which right or privilege is denied because not granted to owners of railroad properties.

This contention is dependent for its vitality entirely upon the proposition that the functions brought to bear upon the different occasions named are different; it being in the one case administrative, and in the other judicial; the conclusion reached in the one case being based solely upon the evidence heard, and in the other upon the knowledge or judgment of the assessing board.

The contention must fail because there is no foundation for the distinction. The same functions are exercised in the one as in the other.

Upshur County v. *Rich*, 135 U. S. 467.
Low et al v. *County Court, etc.*, 27 W. Va. 785.
P., C. & St. L. Ry. Co. v. *Board of Public Works*, 28 W. Va. 264.
Auditor General v. *The Pullman Pal. Car Co.*, 34 Mich. 59.

The assessment of every tax-payer in the State, whether individual, local corporation, or railroad, must rest ultimately upon the determination of the State Board of Tax Commissioners. The way for some may be shorter and more direct, and for others more circuitous and delayed, but the State Board is for all the final arbiter, and beyond its assessment there is nothing but the courts to which any tax-payer can apply for relief, and relief can only be granted then not as a part of the taxing machinery of the State but upon settled principles of law calling for the aid of courts, pure and simple.

The tax-payer may be content with the action of the Township Assessor and make no complaint with the County Board of Review, but under the provisions of section 114 may "upon all recommendations of the County Auditor" * * * "of its own motion, or on sufficient cause being shown by any person, add to the assessment lists," etc. The individual tax-payer or the local corporation may be content with the order of the County Board, but under section 125 appeals lie from its decision to the State Board, and such appeals are not limited to the particular tax-payer upon whose assessment the County Board has made its decision.

In spite of Mr. Justice Miller's prediction in the Slaughter-House Cases, applications have frequently been made to the United States Court for relief on the claim that the laws of the State had denied the equal protection of the laws. The contention has been made in almost every conceivable shape and we now beg to call attention to some adjudications on that subject by the Supreme Court of the United States.

In *Munn* v. *Illinois*, 94 U. S. 113, it was held:

"That the act of the Legislature fixing a charge upon elevators in the city of Chicago, where none is fixed upon other elevators in the State of Illinois, is not a denial of the equal protection of the laws."

To the same effect is *Budd* v. *New York*, 143 U. S. 517.

The law of New York regulated elevators only in cities having a population in excess of 130,000.

In *Hall* v. *DeCuir*, 95 U. S., Justice Clifford says, at page 503:

"Substantial equality is the law of the State and of the United States, but equality does not mean identity."

In *Missouri* v. *Lewis*, 101 U. S. 22, it was held:

1. "That a State may establish one system in one portion of its territory and another system in another, provided always that it neither encroaches upon a proper jurisdiction of the United States or abridges the privileges and immunities of citizens of the United States, nor deprives one person of his right without due process of law, nor denies to any person within its jurisdiction the equal protection of the laws in the same district.

2. "By the Constitution and laws of Missouri the St. Louis Court of Appeals has jurisdiction in certain appeals from the Circuit Courts of St. Louis and three other adjoining counties. The Supreme Court of the State has jurisdiction from all other counties of the State. This provision of law does not deny to parties in the former limit the equal protection of the laws by the denial of the right to appeal to the Supreme Court of Missouri."

In *Soon Hing* v. *Crowley*, 113 U. S. 703, it was held:

1. "That municipal restrictions imposed upon one class of persons engaged in a particular business which are not imposed upon others engaged in the same business and under like conditions, impairs the equal right which all can claim in the enforcement of the laws.

2. "But a restriction that certain work may not be done within certain times is not open to the objection that it denies the equal protection of the laws, although other kinds of work are not so restricted."

In *Barbier* v. *Connolley*, 113 U. S. 27, it was held:

"That a municipal ordinance prohibiting work in public laundries and washhouses within defined territorial limits from 10 o'clock at night to 6 o'clock in the morning, notwithstanding other labor may be carried on within the same district during the prescribed hours, does not deprive such person so prohibited of his property without due process of law nor deny to him the equal protection of the laws."

In *Wurts* v. *Hoagland*, 114 U. S. 606, it was held:

"That the statute of New Jersey providing for the drainage of land upon proceedings instituted by five owners of land in the tract and not objected to by owners of the greater part of the tract, and providing also for the assessment, by the Commissioners, of the expenses upon all the owners does not deny to them the equal protection of the laws."

In *Missouri, etc., Co.* v. *Humes*, 115 U. S. 512, it was held:

"That a statute requiring every railroad company to erect and maintain fence and cattle guards, and, in case it does not, making it liable in double the amount of damage sustained, does not deprive a railroad corporation against which such

double damages are recovered of its property without due process of law, nor deny it the equal protection of the laws. In rendering the opinion Mr. Justice Field, at page 520, uses the following language:

"'It often happens that heavy and oppressive burdens are imposed by Statute upon residents of cities and counties, not merely to meet the necessary expenses of government for buildings and improvements of doubtful advantage, which sometimes, as in changing the grade of streets, seriously depreciate the value of property. Yet, if no rule of justice is violated in the provision for the enforcement of such a statute, its operation in lessening the value of the property affected does not bring it under the objection of depriving a person of property without due process of law. It is hardly necessary to say that the hardship, impolicy or injustice of State laws is not necessarily an objection to their constitutional validity, and that their remedy for evils of that character is to be sought from State Legislatures. Our jurisdiction can not be invoked unless some right claimed under the Constitution, laws or treaties of the United States is invaded. This court is not a harbor where refuge can be found from every act of ill-advised and oppressive State legislation.'"

In *Chicago & North Western Railway Company* v. *McLaughlin*, 119 U. S. 566, the railroad company was sued under section 1307 of the Code of Iowa of 1873, which provides that railroad companies shall be liable for injuries sustained by an employe occasioned by or which was contributed to by the negligence of a co-employe, whereas, except as to railroad companies, the employer was not liable for injuries sustained by the negligence of a co-employe, it being claimed that such act denied to railroad companies the equal protection of the laws. It is clear from the record that the injury was occasioned solely by the negligence of the co-employes of plaintiff, unless, indeed, the plaintiff's own negligence contributed thereto, and a verdict for $15,000 was rendered, which was affirmed by a divided court.

In *Hayes* v. *Missouri*, 120 U. S. 68, the statute of Missouri provides that in capital cases in all cities having a population of over 120,000, the State shall be allowed to peremptorily challenge fifteen talesmen, while in all other instances the State was only permitted to challenge eight; held that such act or the action of the Court thereunder was not a denial of the equal protection of the laws.

In *Pembina Mining Co.* v. *Penn.*, 125 U. S. 181, it was held:

1. That corporations are not citizens within the meaning of the Constitution, but that they are persons within the meaning of section 1 of the Fourteenth Amendment.

2. The State may require of a foreign corporation seeking

admission within its limits such conditions as it may choose, and will not thereby deny the equal protection of the laws.

In *Dow* v. *Beidleman, Ib.*, 680, the State of Arkansas had passed a law fixing the rate for carrying passengers at eight cents per mile on lines of roads fifteen (15) miles in length; at five cents per mile on lines of road over fifteen and less than seventy-five miles in length, and three cents per mile on lines over seventy-five miles in length; held that such act was constitutional, Mr. Justice Gray saying, at page 691:

"It is equally clear that the plaintiffs in error have not been denied the equal protection of the laws. The Legislature, in the exercise of its power of regulating fares and freights, may classify the railroads according to the amount of the business which they have done or appear likely to do. Whether the classification shall be according to the amount of passengers and freight carried or of gross or net earnings during the previous year, or according to the simpler or most constant test of the length of the line of railroad is a matter within the discretion of the Legislature. If the same rule is applied to all railroads of the same class there is no violation of the constitutional provisions securing to all the equal protection of the laws."

In *Powell* v. *Penn.*, 127 U. S. 678, it was held: That the act of Pennsylvania prohibiting the manufacture of oleomargarine is not in violation of the Fourteenth Amendment to the Constitution. It does not deprive the manufacturers of property without due process of law, nor deny to them the equal protection of the laws.

In *Mo., etc., Co.* v. *Mackey*, 127 U. S., the State of Kansas had passed a law similar to that of Iowa, referred to in *Chicago & Northwestern Railway Co.* v. *McLaughlin*, *supra*, and it was maintained that the act denied to the railway company the equal protection of the laws. Mr. Justice Field, on page 209, says as follows:

"The objection that the law of 1874 deprives the railroad companies of the equal protection of the laws is even less tenable than the one considered; it seems to rest upon the theory that legislation, which is special in its character, is necessarily within the constitutional inhibition, but nothing can be further from the fact. The greater part of all legislation is special, either in the objects sought to be attained by it, or in the extent of its application. * * * Such legislation does not infringe upon the clause of the Fourteenth Amendment requiring equal protection of the laws because it is special in its character; if in conflict at all with that clause it must be on other grounds. And when legislation applies to particular bodies or associations imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws if all persons brought under its influence are treated alike under the same conditions * * * Such legislation is not obnoxious to the last clause of the Fourteenth

Amendment if all persons subject to it are treated alike under similar circumstances and conditions, in respect both of the privileges conferred and the liabilities imposed."

In *Watson* v. *Nevin*, 128 U. S. 578, it was said:

"That the provisions of the statute of Kentucky, authorizing the improvement of streets in the city of Louisville to be equally apportioned according to the number of square feet owned by the different property holders, except that corner lots shall be charged twenty-five (25%) per cent. more than other property, does not deny to the owners of property the equal protection of the laws."

In *Minneapolis, etc., Ry. Co.* v. *Beckwith*, 129 U. S. 26, it was held:

"1. That the provision in the act of Iowa, authorizing the recovery of double the value of stock killed where the injury occurs at a point where the company had a right to fence and had failed to do so, does not deprive the company of its property without due process of law, or deny it the equal protection of the laws.

"2. The Fourteenth Amendment does not limit the subjects in relation to which the police power of the State may be exercised for the protection of its citizens."

In *Louisville, etc., R. R. Co.* v. *Woodson*, 134 U. S. 614, it was held:

"Where the statute of Tennessee provides that but two new trials shall be granted because of the fact that the verdict is not sustained by the evidence, and judgment was entered upon a verdict rendered upon a third trial, the verdict in two previous trials having been set aside and new trials granted, held: that this was not a denial of the equal protection of the laws, although it was at the same time in terms found by the court, but for the fact that this was the third trial the new trial should have been granted."

In *Natal* v. *Louisiana*, 139 U. S. 621, it was held:

"That an ordinance of the City of New Orleans prohibiting the keeping of a private market within six (6) squares of any market of the city, under penalty of fine and imprisonment, is not a denial of the equal protection of the laws."

In *Charlotte, etc., R. R. Co.* v. *Gibbes*, 142 U. S. 386, it was held:

"1. That the provisions of the statute of South Carolina, requiring the railways to bear the salaries and expenses of railroad commissioners in addition to the other taxes borne by their property, do not deny to the railroads the equal protection of the laws, nor do they make an unjust discrimination against railways.

"2. The constitutional provisions of South Corolina, that taxation shall be equal and uniform and in proportion to values, is not violated by exacting a contribution from the several railroads according to their gross income, in proportion to the number of miles operated within the State to meet such special services required of the railroad commission."

In *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305, it was held:

"That to levy a tax or assessment upon a foreign corporation doing business within a State, different or heavier than that laid upon domestic corporations, and which also includes business transactions without the State, does not deprive the foreign corporation of the equal protection of the laws."

In the light of these decisions, it seems to us that the courage which would maintain that the act of 1891 is unconstitutional on the theory that the method of assessment provided denies to railroad owners the equal protection of the laws is out of place in the court room; its only appropriate position is at the head of a forlorn hope "in the imminent deadly breach."

VII.

THE CHARGE THAT THE ACT IS UNCONSTITUTIONAL IN THAT IT REQUIRED, PERMITTED AND INVITED THE ASSESSMENT OF A TAX UPON INTERSTATE COMMERCE.

The burden of the complaint of plaintiff in error with respect to this charge is that the act permits and invites an assessment upon interstate commerce in that it authorizes an assessment upon the basis of receipts derived from the use of the road in interstate commerce, and upon the basis of the amount of stock of consolidated companies, representing property in other States used in interstate commerce, and authorizes the Board to consider the gross and net earnings derived from interstate commerce, and to consider the capital stock representing property used in interstate commerce wholly without the State. It is not and could not be maintained that the act, either in terms or by implication, requires an assessment of interstate commerce, but the charge is forced through the channel of permission and invitation, because of the fact that certain schedules of information are required to be furnished under sections 83 and 85 of the act of March 6, 1891.

Section 83 it will be observed, requires certain information to be furnished to the County Auditor. This information is not for the purpose of assessment, and the act nowhere provides that the schedules or lists required by this section should be laid before either the County Board of Review, or the State Board of Tax Commissioners, as made by the owners of railroad property at any time, nor connected with any original assessment.

Under section 134, for equalization purposes purely, the Auditor of the county is required to furnish an abstract of the assessment of the property, and in this would necessarily be contained the information furnished by the schedules or lists given to him under section 83.

It will be observed that the provisions of the act in question, except that it uses the words true cash value in lieu of the fair cash value, are almost verbatim the same as those of the act of 1881. See sections 6367 and 6369 of the Revised Statutes of Indiana, 1883, and are substantially the same as those contained in the act of December 21, 1872. See sections 75 and 79, pp. 80 and 81 of the acts of 1872, as to neither of which has the constitutionality ever been questioned in this or any other court.

It is freely conceded that when the act requires certain information to be furnished to a Board whose duty it is to assess, the law thereby requires that Board not to close its eyes to such information. The law does not, however, require or permit those things as to which information is required to be furnished, to be assessed or valued, or any fictitious or fanciful values to be placed on the property it is required to assess, but on the contrary, the act throughout, with frequent repetitions, requires all assessing officers, whether high or low, to assess all property to be assessed by them at its true cash value.

We submit that the most fruitful imagination could not, without actually doing violence to the language of the act and by construction importing into it something that is absolutely lacking in word and sense, find in it a justification for the charge that it either requires or permits the assessment of interstate commerce. This accusation may be further advantageously discussed under the charge against the action of the Board.

VIII.

THE CHARGE (III *ante* p. 5.)—THAT THE BOARD ASSESSED A TAX UPON INTERSTATE COMMERCE.

This contention is based not upon any direct evidence to that effect, for there is no such evidence in the record. Indeed, upon the trial of the cause, plaintiff in error elected to stand

upon the inferences that it might be able to draw from a portion of the explanatory statements of the Board rather than to ask any witness the direct question. Upon the trial the witness Matthews was asked a series of questions as follows:

Q. 91. Did you or not, in assessing and fixing the value of the St. Louis Division and of the Chicago Division and of the leased and operated lines of the C., C., C. & St. L. Railway in the State of Indiana, place or add anything to the value of said lines by reason of the fact that it had a franchise? (Page 67.)

Q. 92. I will ask you, Mr. Matthews, if in assessing the values of the roads owned, leased or operated by the C., C., C. & St. L. Railway Company in the State of Indiana the valuation of such roads by the Board embraced or included any value whatever on account of the franchise? (Page 68.)

Q. 93. Now, Mr. Matthews, I will ask you whether or not the Board in assessing the C., C., C. & St. L. properties in Indiana added anything to the amount of your assessment against said properties or increased the amount of the assessment on account of the fact that said road had a franchise? (Page 68.)

Q. 94. I will ask you now, Mr. Matthews, whether in assessing the roads owned, leased, and operated by the C., C., C. & St. L. Railway Company in Indiana, the Board added anything to the assessments of the several roads as returned by it, or increased the assessments thereof, or either of them by reason of the business or gross earnings of said road in carrying transportation from points within the State of Indiana to points without the State of Indiana or through the State of Indiana. (Page 69.)

Q. 95. In making the assessment of the properties of the plaintiff owned, operated and leased in the State of Indiana, did you embrace in your valuation returned to the Auditor and make a valuation of the preferred or common stock of the C., C., C. & St. L. railway? (Page 69.)

Q. 96. In making your assessment of owned, operated and leased lines of the C., C., C. & St. L. Railway Company in the State of Indiana, did you make any estimate or valuation of the bonds of the C., C., C. & St. L. Railway Company resting upon property without as well as within the State of Indiana, and embrace such valuation in your assessment and in the return of the value of the various properties of the C., C., C. & St. L. in this State? (Page 70.)

Upon objection, the questions were ruled out and the record shows that the counsel for plaintiff offered to show by the witness, if the questions were permitted to be answered, that the Board took into account the fact that the plaintiff in error had a franchise and added to the value assessed on account thereof, and increased the assessment of the plaintiff in error by reason of the business or gross earnings of the road in carrying transportation from points within to points without the State or through the State; that in making the assessment, the Board valued and embraced in the assessment the values of stocks, resting in part on property wholly outside the State of Indiana.

Afterwards counsel for defendant in error, while not conceding that the questions objected to were competent, withdrew their objections to the above questions, and notified the Court and counsel for plaintiff in error that the questions asked might be answered. (pp. 156, 202 and 213.) Whereupon counsel for plaintiff in error, having taken time to consider (p. 202), withdrew questions 92 to 96, inclusive, and asked question 91, the answer to which is shown in his evidence *ante* p. 19, and during the progress of the trial the Attorney-General of the State and counsel for defendant in error formally notified the Court and counsel for plaintiff in error that if it was desired to ask any member of the Board whether franchises, values beyond the limits of the State, or stocks or bonds were assessed or valued, no objection would be made to the asking of such questions (pp. 67, 70, 224 and 225), but counsel for plaintiff in error, while expressing proper gratitude, declined to ask the questions. It would seem to the ordinary mind that counsel for plaintiff in error preferred to rely upon his ability to wrest a strained construction from portions of the explanatory statement than to take the chance that witnesses under oath might not so testify as to sustain the theory of the case that he was insisting upon.

The main reliance of plaintiff in error to sustain its charge that interstate commerce had been assessed and taxed, consists of two extracts from the explanatory statements of the Board, the one taken from p. 80, and the other from p. 213, of the report of the Board, both found at p. 184 of the record. The first precedes the tables of assessments, and the latter is a part of the formal certificate by the Board.

The objectionable language used by the Board preceding the

tables showing the assessments made against the various railway companies on account of their unit property, the railroad track and rolling stock is as follows:

"The State Board of Tax Commissioners having had under consideration the assessment of the several railroads in the State, the following valuation per mile of the various roads within this State, and the improvements on the right of way and in daily use by such railroads, was unanimously agreed upon, and the same was ordered to be spread upon the record and to stand as the assessment of the railroad property denominated railroad track, rolling stock, and improvements on right of way for the year 1891, which assessment is in the words and figures, to wit:" While that which follows such tables is as follows:

"Making liberal allowances for all proper deductions, the State Board of Tax Commissioners has fixed the values of the respective railroads and parts of roads within the State of Indiana for taxation on the first day of April, 1891, as hereinbefore set forth.

In arriving at the basis for the estimate of said values, the Board has considered the cost of the construction and equipment of said roads, the market value of the stocks and bonds, the gross and net earnings of each of said roads and all other matters appertaining thereto that would assist the Board in arriving at a true cash value of the same."

Counsel for plaintiff in error discusses this language as indicating the secret intentions and efforts of the Board with an earnestness and indignation that borders dangerously on the verge of rabies and professes at least to find in them an occult if not an open and avowed purpose on the part of the Board to neglect their obvious duties, to value for taxation property beyond the limits of the State, not at all subject to their jurisdiction and in violation of their oaths to confiscate railway property, which they were professing to assess for taxation.

This charge is deliberately made and insistently repeated against a Board composed of the Governor of the State, two of its highest administrative officials, and two citizens required to be selected and appointed from opposing political parties with special reference to their fitness for that purpose.

The gravamen of the complaint is that the explanatory statement shows:

1. In arriving at the basis for the estimate of said values the Board has considered

a. The cost of construction and equipment;
b. The market value of stocks and bonds;
c. The gross and net earnings; and
d. All other matters appertaining thereto that would assist the Board in arriving at a true cash value of the same.

2. "The following valuation per mile of the various roads within this State was ordered to be spread upon the record, and to stand as the assessment of the railroad property, denominated railroad track, rolling stock and improvements on right of way."

1. It is vehemently urged that the first necessarily means that having "considered" "earnings," "stocks and bonds" they necessarily assessed them, while the second conclusively shows that the Board did not make a valuation of railroad track and rolling stock, and cause it to be spread of record and stand, but that they valued and assessed the whole railroad property, including stocks, bonds and mortgages, and gross and net earnings (meaning interstate commerce) and having ascertained and assessed the value of all these, caused it to be spread of record as the assessment of railroad track and rolling stock.

To evolve such a mental process and result would seem to acquire mental attainments, not usually deemed necessary, or even desirable, for the purpose of judicially ascertaining truth. To analyze this mental process, we submit that it assumes as a premise which can not be denied, that if any person is to ascertain the value of anything, his mental vision must be fixed upon that one thing, and that alone; if he "considers" or "takes into consideration" anything else whatever, it will be conclusively presumed, whenever the question reaches a Court of Justice, that he has fixed a value not upon the thing that he is attempting to value, but upon the something else which he has considered. If this be true, it is important that it should be judicially stated by the highest court in the land, for in that event the rule sometimes thought to govern in the selection of a petit jury in criminal cases, that no person is eligible to serve who either reads, sees, hears or thinks, should be still further restricted, and to make one competent as an assessor, his mental constitution should be similar to the ostrich, so that having cast one brief look at the object to be assessed, the head should

be at once plunged in the sand so that none of the surroundings might be seen and all further observations made only through the instrumentality of the exposed tail.

The contention of the plaintiff in error must proceed upon the theory that it is a breach of duty for the Board, or any assessing officer, to "consider," or to "take into consideration," any substantive or collateral fact other than the bare, naked property which they are presently to assess, for if they do, they will be conclusively presumed to have valued and assessed the thing considered or taken into consideration; and this rule as a limitation upon the power of assessing officers is as applicable to any other property as it is to railway track and rolling stock, and is not to be limited in its application by reason of the fact that in the latter case the constitutionality of assessing interstate commerce is brought into question. This Court will only consider this record in this respect with reference to the charge of unconstitutionality made, because of the alleged assessment or taxation of interstate commerce, but the rule for which the plaintiff contends is a wider one than simply that particular presented by this record.

The act of 1891, section 95, page 236, Acts of the General Assembly of Indiana for 1891, designates the manner in which real property shall be valued by the Assessor, and requires him to take "into consideration the fertility of the soil, the vicinity of the same to railroads, macadamized roads, clay roads, gravel roads and turnpike roads, State or county roads, cities, towns, villages, navigable rivers, water privileges on the same, or in the vicinity of the same, the location of the route of any canal or canals, with any other local advantages of situation."

If this were a case of the assessment of real estate coming by way of appeal from an injunction suit in the Circuit Court of the United States, upon the contention of plaintiff in error here, this Court would be bound to say that under this statute the officers, being presumed to comply with the law, had assessed not the particular real estate in controversy, but the water privileges, turnpikes, canals and towns or cities which he was required to take into consideration.

The argument must fall of its own weight. It can not be that any assessing board or officer is inhibited from considering or taking into consideration any of the adjacent circumstances which tend to show what is the value of railroad track

and rolling stock, not as farm land, not as a barren ideality, but as it in fact is, a part of a railway extending it may be for only a few miles from one insignificant place to another, or extending from one great mart of trade to another. To carry the plaintiff's contention to its logical conclusion of what the State Board would have a right to do, would be to ascertain what was the value of the ground by the acre as land; then find what was the value of the ties, joints, bars, rails and other paraphernalia, leaving the question an open one whether it should be assessed as new or old, and, when so found, set that down as the value of railroad track. To this point the plaintiff in error does not go in its brief, but if its contention is correct that the Board had no right to take into consideration those things which it did consider, this Court must logically carry the contention of the plaintiff in error up to that very point.

Upon this question the decision of the New York Commission of Appeals in the *People, ex rel., etc.*, v. *Barker et al.*, 48 N. Y. at page 70, presents what we think is the correct theory of the law. We quote from the language of Mr. Commissioner Hunt, from page 77.

"Nor do I see any error in the principle said to have been adopted in determining the value of the land in question. In Hamburg the land amounted to 82 $\frac{7}{100}$ acres. It was a narrow strip of a few rods in width, with the buildings, stations, etc., necessary for the accommodation of a railroad. The argument of the relator's counsel is that this should be assessed as an isolated piece of land, having in substance no beginning or end; that is, not connected with anything at either end beyond the limits of the town. A railroad through the town of Hamburg only, having no connection at either end, would be of no value. The erections and superstructures would destroy its value for farming purposes. As a railroad it would have no passengers and no business, and would be worthless. The attempt to use it as such would involve debt and embarrassment but no profit, In like manner, the portion of the Erie Canal passing through a single town, with no outlet at either end, would be valueless. A mill-race disconnected from the mill would be of no value. The mill severed from its race would be of little value. A block of stores, walled off from all neighboring connections, or deprived of the value resulting from adjoining business and commerce, would be of little value. Each item of property, however, with its connections and accompaniments, and used for the purpose and in the manner intended, might be of great value. Each piece of property is to be estimated in connection with its position, and the business and profit to be derived therefrom. The road in question is part of a whole, and is to be valued as such. This is independent of a taxation of the capital. It is an estimate of the value of the real estate for railroad purposes, as a mill is to be estimated for its value for milling purposes, and not at its value for a church or banking house."

It certainly can not be said that the Board should be required to assess so much of the railroad track and rolling stock of plaintiff in error as is limited to Marion County, or to any other county in the State, for such would be to give a false value to the property; nor could it with any more sense be maintained that the Board in assessing the Cincinnati & Chicago branch, might follow railroad track and rolling stock to the Illinois or Ohio lines, and then close their eyes to the fact that within twenty miles beyond the Ohio line lay the city of Cincinnati with its three hundred thousand inhabitants, and beyond the Illinois line lay the city of Chicago with its million and a quarter of inhabitants, or in assessing the Cleveland and St. Louis lines, leave out of consideration the fact that in the one direction the line ran to Cleveland, and in the other to St. Louis. Nor that going beyond that limited range of vision still farther but connected with them by other connecting lines of railway, lay the cities of Washington, Baltimore, Philadelphia and New York. Were it so, the provision of the Constitution of the State of Indiana, that such regulation should be prescribed as shall "secure a just valuation for taxation of all property," would be as the idle wind.

To emphasize the fallacy of the contention of plaintiff in error it will be instructive to illustrate where it will lead:

The Pennsylvania Railroad Company and the Pennsylvania Company, with numerous collateral companies, controls a line of railroad extending from Jersey City through New Jersey and other States to Chicago, St. Louis and Cincinnati in the West, and to Philadelphia, Baltimore and Washington in the East, and at the latter place connected with various railroad companies running to the South.

Suppose under a law of the State of New Jersey, the assessors of each county were required to assess the railroad track within their county, and under that law the assessors of Hudson County having under consideration the value of the railroad track extending from a point opposite Elizabeth in Union County to Jersey City, and at the same time were required to assess a line of road extending from a point ending in Hudson, not reaching Elizabeth or Union County, and not extending to Jersey City, and having no connection, ferry or otherwise, with New York, and having no dock or other connection with the Hudson River. Or suppose the assessors of Anne Arundel

County in Maryland were required to assess the railroad track of the Baltimore & Potomac road, and also the line of another railroad reaching to but not across either the Patuxent or Patapsco Rivers, and that in all other respects the road bed, the ties, the iron, the sidings, switches and stations in each instance were indentically the same. Could it be said that the line of vision of the New Jersey assessors must stop with the water when it reached the Hudson River, or the estuary dividing Union from Hudson Counties, and that they must close their eyes to the existence of the lordly river, the metropolis of the Western continent on its farther shore, and the broad Atlantic lying on the east with the cities of Philadelphia, Baltimore, Washington and the far South, and Pittsburgh, Cincinnati, St. Louis and Chicago and the great West, and leaving these matters wholly out of consideration, assess the one exactly as the other; and in the Maryland case could it be said that when having traveled over the cross ties from the Patuxent to the Patapsco must they assess the two roads at exactly the same, or might they go a step farther to find that the Baltimore & Potomac was located and equipped so that it might carry apple-jack and tobacco into the Baltimore market and receive in return sugar and rice, but that Washington and the South in one direction and Baltimore, Philadelphia, New York and the ocean in the other, were to be treated as sealed books. Verily the ignorance of imbecility could not be stretched farther.

It is doubtless true that the Constitution of the United States has seduously and carefully provided that Congress and Congress alone shall have power "to regulate commerce with foreign nations and among the several States," and that this Court and all Courts do, and ought to carefully watch and faithfully see that this provision of the Federal Constitution is not impinged upon, and so hold wherever it appears that the States, in whatever manner the attempt may be made, have attempted to regulate, impair, impede or destroy interstate commerce. But this is a widely different proposition from holding that property which may be used in interstate commerce, shall not bear its fair share of the public burdens, which is the correlative of the care and expense which the public incurs and lays out for its protection in common with other preperty.

It is true that it was held in *Brown* v. *The State of Maryland*, 12 Wheaton 419, that a law requiring an importer to take out a license was unconstitutional, because in conflict with the power of Congress to regulate commerce, and it was there said at page 442:

> "When the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has perhaps lost its distinctive character as an import, and has become subject to the taxing power of the State, but while remaining the property of the importer in his warehouse in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."

In *Low et al.* v. *Austin*, 13 Wall. 29, it was held that goods imported from a foreign country, while remaining in the original cases unbroken and unsold in the hands of the importer, are not subject to State taxation, whether the tax be imposed upon them as imports, or upon the goods as part of the general property of citizens of the State which is subject to an *ad valorem* tax, and that they do not lose their character as imports and become incorporated into the State until they have passed from the control of the importer or been broken up by him from their original cases. But it has never been held in any case, so far as we know, that when the imports have once been broken and have become mingled with the general property of the owner, they are exempt from taxation, or that States are prohibited from levying taxes upon them because of the fact that they were imports, and that the effect of that would be to regulate foreign commerce.

It is also true that it has been repeatedly held that government appliances may not be taxed, but it has as often been held that property which may be used as post roads, such as the Western Union Telegraph property, or as the Union Pacific Railway Company, is subject to taxation.

In *The Western Union Telegraph Company* v. *the Attorney General of Massachusetts*, 125 U. S. 530, it was contended on behalf of the Western Union Telegraph Company that the greater portion of its lines was over, under or across post roads, made such by the United States, and that by reason thereof such property could not be taxed; but it was held that that fact and the laws of Congress in reference to post roads did not prevent its being taxed by the State of Massachusetts, although in that same case it was held that the provision of the State statute

authorizing an injunction against the company from transacting business was inoperative and void.

In *Railroad Company* v. *Peniston*, 18 Wall. 5, it was held that a tax upon the property of railroad companies, leaving them free to discharge the duties that they have undertaken to perform as agencies of the Federal Government, may be rightfully laid by the States.

In *People* v. *The Commissioners*, 104 U. S. p. 466, it was held that property consisting of money employed in the purchase of products for exportation is subject to taxation.

In *The County of Santa Clara* v. *The Southern Pacific Ry. Co.*, 18 Federal Reporter 385, which, with the San Mateo case, is regarded by all railroad companies as the Magna Charta of their liberties, so far as regards exemption from State taxation, it was insisted that certain "privileges and powers other than those acquired under the laws of the State were conferred by grant of the General Government, and for them obligations and burdens were assumed not contemplated or possible under their original organization, and that Congress, having selected these corporations as special agents and instruments of the nation for public purposes, clothed them with faculties, powers and privileges, and enabled them to construct and maintain their roads as absolute and military roads of the Government," by reason whereof they were exempted from State taxation, but this contention was denied by the Court, and it was held that their property was taxable as such, notwithstanding the fact that it might be a part of the instrumentalities of the Federal Government, in the absence of any statute by Congress exempting them from taxation.

To sustain its contention, that because the Auditor of State in order to obtain information to enable the Board to ascertain the value and assess railroad track and rolling stock, required reports to be made to him and the State Board of Tax Commissioners reported that it had considered cost of construction, market value of stocks and bonds, gross and net earnings, etc., the State Board of Tax Commissioners must be deemed to have assessed instrumentalities of interstate commerce, and has, therefore, in violation of the provision of the Federal Constitution, regulated or restricted commerce. Counsel for plaintiff in error cites a line of cases, in which what the States

can not do, because constituting a regulation of commerce, has been held by this Court, viz.:

Case of the State tax on foreign-held bonds.

Railroad Company v. *Pennsylvania*, 15 Wall. 300.

Pensacola Telegraph Company v. *Western Union Telegraph Company*, 96 U. S. 1.

Glouster Ferry Company v. *Pennsylvania*, 114 U. S. 196.

Fargo v. *Michigan*, 121 U. S. 230.

Philadelphia Steamship Company v. *Pennsylvania*, 112 U. S. 326.

Leloup v. *The Port of Mobile*, 127 U. S. 640.

Ratterman v. *Western Union Telegraph Company*, 127 U. S. 411.

Western Union Telegraph Company v. *Alabama, etc.*, 132 U. S. 472.

Lyng v. *Michigan*, 135 U. S. 161.

McCall v. *California*, 136 U. S. 104.

Pickard v. *Pullman Southern Car Company*, 137 U. S. 34.

Crutcher v. *Kentucky*, 141 U. S. 47.

Lehigh Valley Railroad Company v. *Pennsylvania*, 145 U. S. 192.

In *Leloup* v. *The Port of Mobile*, it was said by Mr. Justice Bradley, at page 68,

> "That no State has the right to lay a tax on interstate commerce in any form, whether
>
> (*a.*) By way of duties laid on the transportation of the subjects of that commerce;
>
> (*b.*) On the receipts derived from that transportation;
>
> (*c.*) From the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce and amounts to a regulation of it, which belongs solely to Congress."

And in *Lyng* v. *Michigan*, 135 U. S., it was said by the Chief Justice, at page 166:

> "We have repeatedly held that no State has a right to lay a tax on interstate commerce in any form, whether
>
> (*a.*) By way of duties laid on the transportation of the subjects of that commerce;
>
> (*b.*) On the receipts derived from that transportation, or
>
> (*c.*) On the occupation or business of carrying it on for the reason that such taxation is a burden on that commerce and amounts to a regulation of it which belongs solely to Congress."

This was by way of the statement of a proposition and not at all by way of a quotation from Mr. Justice Bradley. This

latter language is quoted by Mr. Justice Bradley with approbation in *Crutcher* v. *Kentucky*, 141 U. S., at page 58, and by Mr. Justice Lamar, in *Pacific Express Company* v. *Seibert*, 142 U. S., at page 349. And in the case of the State Tax on Foreign-held Bonds, it was held that the power of taxation of a State was limited to persons, property and business within her jurisdiction, and that all State taxation must relate to one of these subjects.

In *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S., it is said by Mr. Justice Field, at page 206:

> "It is true that the property of corporations engaged in foreign or interstate commerce, as well as the property of corporations engaged in other business, is subject to State taxation, provided always it be within the jurisdiction of the State."

In *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S., it is said by Mr. Justice Bradley, at page 342: "No doubt a ship owner, like any other citizen, may be personally taxed for the amount of his property, or assessed without regard to the source from which it was derived, whether from commerce or banking, any other employment." And at page 345:

> "The corporate franchises, the property, the business, the income of corporations created by a State may undoubtedly be taxed by the State, but in imposing such taxes care should be taken not to interfere with or hamper, directly or by indirection, interstate or foreign commerce, or any other matter exclusively within the jurisdiction of the Federal government."

The inhibitions upon State taxation laid down by this Court in these cases may be analyzed as follows:

1. The property taxed must be within the jurisdiction of the State.
2. No tax can be laid on the transportation of interstate or foreign commerce.
3. No tax can be laid on the receipts derived from that transportation.
4. No tax can be laid upon the occupation or business of carrying on either interstate or foreign commerce.
5. No tax can be laid upon property which has been imported while it still occupies the original situation or condition in which it is imported.
6. No tax can be laid, as such, upon government appliances.

But while carefully laying down these inhibitions, it is, wherever proper occasion presents itself, as carefully said that

all property, whether engaged in interstate or foreign commerce, whether used incidentally as a government appliance in the transportation of troops or of the United States mails, upon post roads, is as exactly subject to taxation as any other property within the jurisdiction of the State, and whether the tax is either an excise or an *ad valorem*, it is nowhere said that the State is inhibited from looking beyond State lines, or to the business for which the property is used, in order to determine what portion shall be excised, or to ascertain the value upon which the tax is to be levied.

We now beg to call the attention of the Court to a line of cases in which it was maintained that the tax in question was invalid, because in violation of the Constitution of the United States, viz.:

Delaware Railroad Tax.

Minot v. *The Philadelphia, etc., Railroad Co. et al.*, 18 Wall. 206.

Sherlock et al. v. *Alling, Administrator*, 93 U. S. 99.

Telegraph Co. v. *Texas*, 105 U. S. 640.

Wiggins Ferry Co. v. *East St. Louis*, 107 U. S. 365.

Western Union Telegraph Co. v. *Massachusetts*, 125 U. S. 530.

Marye v. *Baltimore & Ohio Railroad*, 127 U. S. 117.

Pullman's Palace Car Company v. *Pennsylvania*, 141 U. S. 18.

Massachusetts v. *The Western Union Telegraph Company*, 141 U. S. 40.

Maine v. *The Grand Trunk Railway Company*, 142 U. S. 217.

In the Delaware Railroad Tax, *Minot* v. *The Philadelphia, etc., Railroad Company et al.*, 18 Wall. 206, The Philadelphia, Wilmington & Baltimore Railway Company consisted of three corporations chartered by the States of Delaware, Maryland and Pennsylvania, consolidated into one company with a common stock. The State of Delaware passed an act providing, among other things, that, in addition to its other taxes, every company should pay to the Treasurer of the State, for the use of the State, a tax of one-fourth of 1 per cent. upon the actual cash value of every share of its capital stock, and that when the line of railroad lay partly in that State and partly in adjoining States, the company should be required to pay the tax on such number of the shares of its capital stock as would be in proportion to the whole shares,

which the length of the road within the State should bear to the whole length of the road.

Minot, a citizen of Massachusetts, addressed a communication to the President of the company, inquiring whether it intended to protect his interests by resisting the collection of the tax assessed against the railroad company. The directors in answer resolved that while they protested against the legality of the tax, they declined to take the responsibility of interfering to prevent its collection, leaving the stockholders at liberty to assert their rights in such manner as they thought proper, and thereupon Minot filed a bill in the Circuit Court of the United States to enjoin the collection of the tax, on the ground, among other things:

(*a*) That it conflicted with the power of Congress to regulate commerce among the States, and,

(*b*) Which was the same—that it interfered with the right of transit of persons and property from one State into or through another.

The validity of the tax in the respect referred to was affirmed, and it was said by Mr. Justice Field at page 232:

"It remains to notice the objections that the act of 1869 conflicts with the power of Congress to regulate commerce among the several States, and interferes with the right of transit of persons and property from one State into or through another. The tax imposed by the act in question affects commerce among the States and impedes the transit of persons and property from one State to another just in the same way, and in no other that taxation of any kind necessarily increases the expenses attendant upon the use or possession of the thing taxed. That taxation produces this result of itself constitutes no objection to its constitutionality. As 'every tax upon personal property or upon occupations, business, or franchises, affects more or less the subjects and the operations of commerce. Yet it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution.' The exercise of the authority which every State possesses to tax its corporations and all their property, real and personal, and their franchises, and to graduate the tax upon the corporations according to their business or income, or to the value of their property when this is not done by discrimination against rights held in other States, and the tax is not on imports, exports, or tonnage or transportation to other States, can not be regarded as conflicting with any constitutional power of Congress."

In *Sherlock et al.* v. *Alling, Administrator*, 93 U. S. 99, the State of Indiana had passed an act providing that "when the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action," etc., and it was claimed that the defendants, the owners of a line of steamers engaged in navigating the Ohio River

between Cincinnati and Louisville, were liable to the decedent's administrator; it was maintained by the defendants that the act of Indiana was unconstitutional because a regulation of commerce, but the judgment rendered in the courts of Indiana and upheld by the Supreme Court was affirmed, and it was said by Mr. Justice Field at page 102:

"In supposed support of this position" (that the act of Indiana was an interference with commerce) "numerous decisions of this Court are cited by counsel to the effect that the States can not, by legislation, place burdens upon commerce with foreign nations or among the several States. The decisions go to that extent, and their soundness is not questioned. But, upon an examination of the cases in which they were rendered, it will be found that the legislation adjudged invalid imposed a tax upon some instrument or subject of commerce, or exacted a license fee from parties engaged in commercial pursuits, or created an impediment to the free navigation of some public waters, or prescribed conditions in accordance with which commerce in particular articles, or between particular places was required to be conducted. In all the cases, the legislation condemned operated directly upon commerce, either by way of tax upon its business, license upon its pursuit in particular channels, or conditions for carrying it on."

And at page 104:

"And it may be said generally, that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit."

In *Telegraph Company* v. *Texas*, 105 U. S. 640, while holding that the provisions of the State law, imposing a specific tax upon messages transmitted beyond the State interfered with interstate commerce, and that for that reason the law was unconstitutional, Mr. Chief Justice Waite uses the following language at page 464:

"This property in the State is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and its business."

In *Wiggins Ferry Company* v. *East St. Louis*, 107 U. S. 365, it was held that a license fee exacted by the town of East St. Louis or the State of Illinois from a ferry company engaged in the business of interstate commerce, to wit: that of carrying passengers across the Mississippi River was not unconstitutional as a regulation of interstate commerce. It was conceded that the company was engaged in no other business whatever but that of interstate commerse, and that its entire

plant consisted of appliances for the purpose of carrying on interstate commerce, but it had its situs in the State of Illinois and the town of East St. Louis. This case may be advantageously considered in connection with the case of the *Gloucester Ferry Company* v. *Pennsylvania* 114 U. S. 196, in which substantially such a tax was held to be unconstitutional, the distinction between them being that in the latter case the company and its property had their situs in New Jersey, and could not be taxed in Pennsylvania because that necessarily constituted a tax upon interstate commerce, while in the former case the company and its property had its situs in Illinois, and that being the case the Illinois tax was held constitutional, and not a regulation or interference with interstate commerce.

In *Western Union Telegraph Company* v. *Massachusetts*, 125 U. S. 530, the tax was levied upon the property in Massachusetts in the proportion in which the length of the lines in Massachusetts bore to the length of the entire line within as well as without the State of Massachusetts.

The answer of the Telegraph Company denied the validity of the tax (page 538) on the ground that it was

a. An instrument of commerce, and

b. A Government agent for the transmission of public business, which the State could not limit, control, refuse or tax, it being averred that a very large proportion of the lines within the State of Massachusetts were upon post roads enjoined by reason of the act of Congress, and as such not taxable. The validity of the act in respect to the tax was affirmed by the Supreme Court.

In the opinion of Mr. Justice Miller, no mention is made in respect to the tax itself, that it interfered with interstate commerce, but the claim that it was a Government appliance authorized by Congress, and, therefore, not taxable by the State, was carefully considered, and it was held that the property was taxable, notwithstanding that fact. That the attention of the Court was directed to the fact that the company was engaged in interstate commerce is clearly shown in the concluding portion of the opinion on page 554. The act of Massachusetts authorized an injunction, in certain contingencies, to issue against the further carrying on of business, and this portion of the act the Court held to be unconstitutional as an interference with interstate commerce.

While the question of the levying of the tax as a regulation of commerce was not before the Court, it is equally an authority upon that contention, for an interference with Government appliances is denied to the States as much as an interference with interstate commerce, and when it was held, as it was, that a tax upon property used as such appliance by the general Government was not inhibited by the Constitution, that was equally a holding that a tax upon property engaged in interstate commerce was not a violation of the Constitution.

In *Marye* v. *Baltimore & Ohio Railroad*, 127 U. S. 117.

While the levy of the particular tax in controversy was enjoined, and the action of the Court below in that respect affirmed, it was not because the property under apt circumstances would not have been liable to the tax, but because there was no legislation by the State of Virginia authorizing the assessment, levy or collection of such tax.

Mr. Justice Matthews, in the very outset of his opinion, uses the following language at page 123:

"It is not denied, as it can not be, that the State of Virginia has rightful power to levy and collect a tax upon such property used and found within its territorial limits, as this property was used and found, if and whenever it may choose, by apt legislation, to exert its authority over the subject. It is quite true, as the situs of Baltimore & Ohio Railroad Company is in the State of Maryland, that also upon general principles is the situs of all its personal property; but for purposes of taxation, as well as for other purposes, that situs may be fixed in whatever locality the property may be brought and used by its owner, by the law of the place where it is found. If the Baltimore & Ohio Railroad Company is permitted by the State of Virginia to bring into its territory, and there habitually to use and employ a portion of its movable personal property, and the railroad company chooses so to do, it would certainly be competent and legitimate for the State to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon other similar property, used in the like way by its own citizens. And such a tax might be properly assessed and collected in cases like the present where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business. In such cases the tax might be fixed by an appraisement and valuation of the average amount of the property thus habitually used, and collected by distraint upon any portion that might at any time be found. Of course, the lawfulness of a tax upon vehicles of transportation used by common carriers, might have to be considered in particular instances with reference to its operation as a regulation of commerce among the States, but the mere fact that they were employed as vehicles of transportation in the interchange of interstate commerce would not render their taxation invalid."

In *Pullman's Palace Car Company* v. *Pennsylvania*, 141 U. S. 18, the State of Pennsylvania had levied a tax on the capital

stock of all corporations engaged in the transportation of freight or passengers within the State, by taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which its cars are run within the State bears to the whole number of miles in that and other States over which its cars are run, and it was held that such act as applied to such corporation—a foreign one—did not violate the clause of the Constitution granting to Congress the power to regulate commerce among the several States. It was maintained that the corporation was created by the law of the State of Illinois. That it had no situs in Pennsylvania; that it simply ran its cars through and across the State of Pennsylvania in carrying on interstate commerce.

It was said by Mr. Justice Gray, at page 23:

"It is equally well settled that there is nothing in the Constitution or laws of the United States which prevents a State from taxing personal property employed in interstate or foreign commerce, like other personal property within its jurisdiction."

And at page 25:

"Much reliance is also placed by the plaintiff in error upon the cases in which this Court has decided that citizens or corporations of one State can not be taxed by another State for a license or privilege to carry on interstate or foreign commerce within its limits. But in each of those cases, the tax was not upon the property employed in the business, but upon the right to carry on the business at all, and was, therefore, held to impose a direct burden upon the commerce itself."

And again at the same page:

"The cars of this company within the State of Pennsylvania are employed in interstate commerce, but their being so employed does not exempt them from taxation by the State, and the State has not taxed them because of their being so employed, but because of their being within its territory and jurisdiction."

In *Massachusetts* v. *The Western Union Telegraph Company*, 141 U. S. 40, the taxation of the Western Union Telegraph Company by Massachusetts was again upheld, and the decision in 125 U. S. was adhered to.

In *Maine* v. *The Grand Trunk Railway Company*, 142 U. S. 217, it was held that a State statute requiring every corporation operating a railroad to pay an annual tax for the privilege of exercising its franchises, determined by the amount of its gross transportation receipts, and that when applied to a railroad lying partly within and partly without the State, or to one operated as a part of the system extending beyond the State, the tax should be equal to the proportion of the gross receipts in the State,

is not in conflict with the Constitution of the United States. This case, it is true, was that of an excise rather than an *ad valorem* tax, but it needs no argument to show that there is and can be no distinction in that respect. If a State statute is in violation of the Constitution of the United States as a regulation of interstate commerce, it is entirely immaterial whether it does so by means of an *ad valorem* or of an excise.

The argument was greatly pressed in that case that the statute was invalid, because in conflict with the power of Congress under the Constitution to regulate commerce among the several States, and that the only business of the defendant in error was that of interstate and foreign commerce, and that the tax was levied upon the privilege of carrying on that business. The defendant was a foreign corporation, with its principal place of business at Montreal.

It was said by Mr. Justice Field at page 228:

"The Court below held that the imposition of the taxes was a regulation of commerce, interstate and foreign, and, therefore, in conflict with the exclusive power of Congress in that respect, and on that ground alone it ordered judgment for the defendant. This ruling was founded upon the assumption that a reference by the statute to the transportation receipts and to a certain percentage of the same in determining the amount of the excise tax, was in effect the imposition of the tax upon such receipts, and, therefore, an interference with interstate and foreign commerce. But a resort to those receipts was simply to ascertain the value of the business done by the corporation, and thus obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied; and we are unable to perceive in that resort [respect] any interference with transportation, domestic or foreign, over the road of the railroad company, or any regulation of commerce which consists in such transportation. If the amount ascertained were specifically imposed as the tax, no objection to its validity would be pretended, and if the inquiry of the State as to the value of the privilege was limited to the receipts of certain past years instead of the year in which the tax is collected, it is conceded that the validity of the tax would not be affected, and if not we do not see how a reference to the results of any other year could affect its character. There is no levy by the statute on the receipts themselves, either in form or fact. They constitute, as said above, simply the means of ascertaining the value of the privilege conferred."

The principles to be deduced from these authorities are:

1. Wherever property has a situs within the State, it is subject to taxation, and it is entirely immaterial in that respect whether the property is used as a means of interstate or foreign commerce, and

2. That, in ascertaining the value to be assessed, whether for excise or *ad valorem*, State authorities are not restricted to

considering only those elements which lie within the State lines.

We insist, therefore, that it was not only proper, but that any other course would have been improper and in the largest degree unfair to other property in the State, and that, for the purpose of ascertaining, not the values beyond the State limits, but the value of the property within the State, it was necessary and proper for the Board to inquire and consider the uses to which the property was being put, the receipts that it could earn, and that the requirements of the act and of the Auditor of the State were only those proper things which the Board would need in order to enable it intelligently to ascertain the value of the property subject to its jurisdiction.

It would be the height of folly to assert that it was proper for a local Assessor to look beyond the lines of his township to see whence and to what point the railroad to be assessed ran, and then claim that the State Board of Tax Commissioners, having a larger duty to perform, could only consider those things that lay within the limits of their own State.

2. It is contended in the second place that the explanatory statement of the Board shows that it assessed railroads in its broadest and most comprehensive sense—in lieu of assessing railroad track and rolling stock—and then ordered that assessment to be falsely entered of record as the assessment that it was required to make under the statute.

This conclusion is based solely on the language of the statement. It is not contended that there was any evidence, either direct or indirect, introduced upon the trial other than that contained in the statement, and upon the language taken in connection with the language contained at several places cited in the act itself, the contention is made.

It is elementary that, in the construction of the statute, the act must be taken as a whole and each part construed with every other part, so as to harmonize all parts.

Potters Dwarris, 193.

Storms v. *Stevens*, 104 Ind. at p. 51.

Stout v. *The Board, etc.*, 107 Ind. at p. 347.

The same rule applies not only to contracts, but to other instruments of writing.

Wolford v. *Herald Printing, etc., Co.*, 32 N. E. 929.

And the language of the statement must be construed as the act of sworn public officers, with the legal presumption that they have performed their duty.

So construed, we submit that this statement, so far from indicating that the officers had done the acts which are charged against them, shows conclusively that they had not done either or any of them, but had properly performed the duty imposed upon them by the Constitution and laws of Indiana and their oaths of office.

Sections 76 to 88 inclusive of the act of March 6, 1891, in providing for the assessment of the taxable property of railroads, whether owned by individuals or corporations, recognizes and provides for the actual distinction between local and unit property, and provides that the local property shall be assessed by local officials as other local property, while its fixed unit property described as right of way, etc., denominated "railroad track" in section 78 and 79, and its movable unit property denominated "rolling stock" in section 80, shall be assessed by the State Board.

Section 120, in defining the duties of the State Board, says, among other things, that it shall be their duty, fourth, "especially to see that all the railroads and other corporations of the State are assessed and taxed as provided by law;" that is, to see that local officials do their duty with reference to local property, and itself do its duty with reference to the unit property. It is a most extraordinary construction of an act to claim to see in this provision a mandate to disregard the law.

Section 129 provides that the State Board shall meet, among other things, "for the purpose of assessing railroad property * * * they shall not be bound by any reports or estimates of value of railroad property, * * * but shall assess and appraise all property at its true case value as defined by this act, according to their best knowledge and judgment." What property? Property not subject to their jurisdiction, or property which by the act they are required to assess? We submit that there can be but one answer to the question. Section 137 provides that the "State Board shall also assess the railroad property denominated in this act as 'railroad track' and 'rolling stock.'"

We submit that the statement should be laid along side of and construed with the act itself, and when they state that

"having had under consideration the assessment of the several railroads, the following valuation per mile of the various roads within this State and the improvements on the right of way and in daily use by such railroads, was unanimously agreed upon, and the same was ordered to be spread upon the record, and to stand as the assessment of the railroad property denominated railroad track, rolling stock and improvements on right of way"—using in that respect the identical language of sections 79, 80 and 157—the Board must be conclusively held, in the adsence of any evidence to the contrary, to have tracked the law and to have assessed only such property as under the Statute they were required to assess, and when they add, following the tables which follow the language above used, the further statement that it has "fixed the values of the respective railroads and parts of roads," etc., the Court will consider the whole language together as a whole and as though the two parts of the statement were joined, notwithstanding the latter expression, because of the great length of the intervening tables is on page 213, while the other is at page 80, and thus from the whole statement determine that the Board had followed *cy pres* the language of the act, and had complied with its sworn duty instead of determining that they had in fact done something else and adopted a clumsy subterfuge of verbiage for the purpose of concealing their wickedness, but at the same time compound with their consciences by enabling them to certify to literal truth, intending to have it understood by the officials as really something else.

IX.

THE EVIL EYE AND THE UNEQUAL HAND.

Counsel for plaintiff in error insists that the record shows that the act of 1891 was administered with "an evil eye and an unequal hand," within the language of Mr. Justice Matthews in *Yick Wo* v. *Hopkins*. We have already *supra* sufficiently analyized this case. The contention on this branch, of the plaintiff in error is again largely based upon the averments in the original complaint, and not upon the evidence. It is largely devoted (and this also plays a prominent part in his

discussion of "Due Process of Law") to the fact that Mr. Van Vorhis was heard by the Board on the evening of the 18th of August, in the absence of the plaintiff in error, and without any opportunity afforded to it to cross-examine or refute the statements of Mr. Van Vorhis by evidence.

If it be true, as counsel for plaintiff in error intimates in his brief, but does not so expressly say, and no authorities are cited to sustain such a position, that in making the assessment of the railroad track and rolling stock of the plaintiff in error, the State Board of Tax Commissioners acted judicially in its strict sense, and that it could hear nothing in the absence of plaintiff in error, but that there was the absolute right on the part of plaintiff in error to be present at all times while its assessment was under consideration, to hear whatever was said to the Board, and to know everything that was in the mind of any member of the Board, to cross-examine, and then be afforded the opportunity to produce evidence in rebuttal, and that when the Board had heard everything that it desired to hear, it must weigh the evidence and decide upon the credibility of witnesses and the weight of testimony in the same manner and to the same extent that is required of a jury or of a court trying a case, there would be grave grounds for the objection taken by plaintiff in error to the action of the State Board in listening to the statements of Mr. Van Vorhis. But we submit that no court has ever yet laid down any such proposition, and that if such a rule were laid down to govern the assessment of taxes, States would be at the mercy of unwilling railway corporations. We have heretofore under the head of "Due Process of Law," discussed this proposition; we now beg to call the attention of the Court to some authorities directly upon that subject.

In *Kansas Pacific Railway Company* v. *Commissioners of Riley County*, 20 Kan. 141, it was said at page 144:

> "The question then resolves itself into this: Upon what may a Board of Equalization act? May they act entirely upon the assesments and returns made to them, guided by their personal knowledge, or must they accept the assessments and returns as conclusive, unless other and outside testimony is produced? We think they may act entirely upon the assessments and returns made to them, guided by their own knowledge. We do not mean that they are limited to these matters and that they can not procure testimony and avail themselves of other means of information. The matter of equalization is committed to their discretion. It is not a judicial proceeding, nor one from which error will lie. They may

avail themselves of such means of information as they may deem necessary. * * If in any matter they desire further information they may seek it whence and in what manner they deem best."

In *Case* v. *Dean*, 16 Mich. 12, it was said:

"The Board has full and complete jurisdiction (not subject to review) over the whole subject, * * * and may adopt their own means in reaching the results."

In the case of *St. L., V. & T. H. R. R.* v. *Surrell*, 88 Ill. 535, in which the assessment made by the State Board was assailed, the Court said:

"The law does not provide that the return shall be *prima facie* or conclusive evidence of anything. * * * It has never been supposed that it is essential to a valid assessment that township or other Assessors shall hear evidence in fixing the taxable value of property. On the contrary, it is believed that they almost uniformly act upon their own knowledge and individual judgment as to its worth, such being the uniform course when the State Board was created, and it was empowered to fix the value of property belonging to corporations, the General Assembly must have intended that body to act in the same manner."

In *Sterling Gas Company* v. *Higby*, 134 Ill. 658, it was decided that:

"The State Board of Equalization is not concluded by the valuation placed upon the property of a corporation by its officers, and that it is not essential that it should first hear evidence in fixing the taxable value of property or in changing the value returned by the corporation. The law gives to the Board the power, and imposes upon it the duty of ascertaining and determining the value, and in fixing it, the members of the Board may act upon their own knowledge and judgment."

In *Republic Life Insurance Co.* v. *Pollak*, 75 Ill. 298, the Court said:

"There can be no question that the Board is composed of persons elected to assess and fix the value of such property as has been designated by law. And in pursuance of their power * * * they have assessed and valued this property, and we are powerless to change the valuation they have fixed. Nor can we examine the mode of reasoning or the basis adopted to ascertain the value of the property. It may be illogical or even absurd, but that in nowise affects the exercise of the power. If we could look into the mode of reasoning adopted because it was wholly illogical, we would have the power to do so if not strictly logical, and to do so, the Courts would become the assessors of property and fix its value for taxation, and not the officers elected for the purpose. We can not, therefore, inquire into the manner in which the Board arrived at the value fixed on the property."

The Counsel for plaintiff in error discusses the action of the Board as though the return of the railroad company constituted the assessment, and the action by the Board constituted an increase of their assessment, without subsequent notice of the Board of such intention or action. For a great many years

in the State of Indiana it was the rule that tax-payers returned their own list, and they were accepted and taxed upon them without any right of revision whatever, but that has long ceased to be the rule, and since 1872 it has never been the law of this State that any tax-payer, whether individual or corporate, made the assessment.

In the case of individuals, the tax-payer sets down the property with his valuation upon it. This list is then returned to the Assessor, who with this knowledge and such knowledge as he has or may obtain by inquiry, affixes a value upon the articles returned, and the value affixed by the Assessor constitutes, in the absence of any further proceeding in due course, the assessment. The amount of the property subject to taxation, in the absence of a notice by the Assessor, is taken as true as stated upon the list, but the value is not, nor is the individual property holder entitled to notice of a fixing of the different valuations by the Assessor. So with local corporations. They make their returns as required by law to the Auditor, who lays the returns before the County Board of Review, and the County Board of Review upon that, without further notice to the party to be assessed, affixes the value, and so with railroad companies as to their unit property, their local property being assessed by County Boards of Review, as in other instances, they make their returns, and with those returns before them, the Board neither adds to nor subtracts but proceeds after the time has arrived at which under the law they are required to convene for that purpose, to make the assessment. The returns of the railroad company are laid before them for their information, but the assessment they make is upon the information they have or get, and they do not do this by way of adding to or changing the return, but they make the original assessment.

The law, bearing in mind the improbability that local Assessors or local Boards of Review will have sufficient knowledge to make an assessment of railroad track and rolling stock, which may, and usually does, run into and through a large number of different counties in the State, has provided that the Governor, the Auditor, and the Secretary of State, together with two Tax Commissioners specially appointed for that purpose, shall constitute the Board for the assessment of all the unit property owned by the different roads throughout the State. Possibly the act might have selected a better Board.

Whether it might or might not is not for the courts to determine. If the Legislature has the right—and under the Constitution of Indiana it not only has the right but that duty is imposed upon it—of providing a Board for making that assessment, its action in that respect is not to be reviewed by the Courts, and it must be assumed, in the absence of anything to the contrary, that the Legislature has complied with the duty imposed upon it by the Constitution, and has provided by law for the selection of a competent Board to make these assessments.

Counsel for plaintiff in error discusses this case as though it had been properly alleged in the complaint and had been proved by the evidence that the Board, in order to deny to the plaintiff in error the right to have its assessment corrected, had made an assessment and withheld it from the record, and from the knowledge of the plaintiff in error until the 8th of September, three days before the adjournment of the Board. There is nothing whatever in the evidence to warrant this accusation. We have heretofore given all the evidence upon this and upon other subjects that was heard by the Court below. From this it appears that on the 8th of September the Board arrived at a conclusion in reference to the assessments to be made, and gave the figures to its Secretary, who proceeded on that day and continuously thenceforth until they were all entered of record, to recording the assessments. There is nowhere in the evidence a syllable of a suggestion that the Board withheld or attempted to withhold, concealed or attempted to conceal from any party in interest, knowledge of its assessment. It gave to the plaintiff in error notice that it would be heard on the 21st of August, and on the 21st of August it was heard by Mr. Dye, its general solicitor, and so far as the record discloses, no limit was placed upon the plaintiff in error as to its right to be heard. It nowhere appears in the record that at any time thereafter, the plaintiff in error, by its solicitor or any one else, made any inquiry or sought in any manner to obtain any knowledge in regard to the assessment by the Board, but now in this Court of last resort, after it has been heard before the Board, and after the trial in the Court below, it is sought by innuendo, suggestion and reiteration, to affect a lodgment upon this Court that a secret assessment had

been made and withheld from the knowledge of plaintiff in error until after the Board adjourned.

We submit that this is not in proper accord with this high forum in which the contention is to be heard.

As already suggested in this brief, upon all questions of general law, upon the construction of the act of March 6, 1891 as affecting such questions, and upon the construction of the Constitution of Indiana, it is not only not necessary, but it would be hardly within the proper limits of a brief, to defend or uphold the decision of the Supreme Court of Indiana. Upon those questions, its decision is not subject to the revisory power of this Court, and any argument along that line would be out of place.

Upon the Federal questions presented by the record, upon which alone the writ of error was granted, we submit that we have shown that neither the legislation of the General Assembly of the State of Indiana, or the acts of its State Board of Tax Commissioners, have transcended the limits of the Constitution or laws of the United States, and, therefore, the judgment of the Supreme Court of Indiana should be affirmed.

Respectfully submitted,

ALONZO GREENE SMITH,
Attorney-General of Indiana.

ALBERT J. BEVERIDGE,
JOHN W. KERN,
WILLIAM A. KETCHAM,
Of Counsel.